S. Dept. of State, Office of the Legal Adviser.

THE SOVEREIGNTY OF ISLANDS CLAIMED UNDER THE GUANO ACT and of the NORTHWEST HAWAIIAN ISLANDS MIDWAY AND WAKE

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DEPARTMENT OF STATE

THE LEGAL ADVISER

The Sovereignty of the Islands of Roucador, Quito Sueno, Serrana, and Serranilla.

E. S. Rogers
Legal Adviser's Office
Department of State
Washington, D. C.

August 9, 1932

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INTRODUCTION

Roncador, Quito Sueno, Serrana, and Serranilla are four coral banks in the western part of the Caribbean Sea, between Nicaragua and Jamaica. The banks are for the most part submerged but on each of them is some dry land, most of the islands being only about a quarter of a mile square, and three or four feet high. These islands are claimed by the United States, and some or all of them are or have been at one time claimed by Nicaragua, Honduras and Colombia. Although this controversy over sovereignty of the islands has obtained since the middle of the nineteenth century, no thorough investigation and final settlement of the claims has been made. It is to be hoped that this report will provide a basis for such a settlement.

I. Sources of Information

The information herein set forth has been collected from material in the State Department archives, books, and maps of the Caribbean region. Original letters in the archives are perhaps the best primary sources available, but in this case, as in the case of secondary

authorities,

authorities, due regard must be paid to the interest of the person writing, to his knowledge of the subject, and to the legal as well as historical significance of his statements.

These criteria are particularly important in considering the various interpretations of the Guano Act made by United States officials from time to time. These statements could be regarded as binding admissions of the Government, analogous to statements against interests and admissions in local law. This is not necessarily the proper conclusion, however. In the first place, they have been by no means consistent, and the only conclusion which can fairly be drawn from them is that no one knew what the Guano Act really did mean. In the second place, they were often made by officials who had a particular set of facts in mind, and who should not be regarded as committing the Government to a definite position with respect to circumstances not at the time contemplated. In the opinion of the Presiding Commissioner in the Chamizal Case it was said that:

> "While considerable importance appeared to be attached by the parties to various expressions contained in this correspondence, the Commissioners, at an early stage in the argument, expressed their view that neither of the high contracting parties should be bound by the unguarded language contained in many of the

letters.

letters. The only real importance to be attached to this correspondence is that it shows conclusively that a considerable doubt existed as to the meaning and effect of the boundary treaties of 1848 and 1853." [1]

* * * *

"It would be useless to multiply citations from diplomatic correspondence, which is not always consistent, and which falls under the rule laid down by the Hague Tribunal in the recent award in the North Atlantic Coast Fisheries reference. Speaking of similar unguarded expressions contained in diplomatic correspondence the Presiding Commissioner expressed the following opinion, which seems applicable to a great many of the communications which have been relied upon by one or other of the parties in the present case:

'The Tribunal, unwilling to invest such expressions with an importance entitling them to affect the general question, considers that such conflicting or inconsistent expressions as have been exposed on either side are sufficiently explained by their relations to ephemeral phases of a controversy of almost secular duration, and should be held to be without direct effect on the principal and present issues.' "[2]

Care must also be taken not to draw too many conclusions from maps, for, although they may be good evidence of certain geographical factors, they are not usually

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[1] Award in the Chamizal Case, Arbitration between the United States and Mexico (June 1911) p. 20.

[2] Ibid, p. 25.

usually reliable evidence of the sovereignty of land. Cartographers do not as a rule indicate the sources of their information; so, if a map states that a certain territory belongs to a particular country, it is evidence only that someone thought so, and not that he had good reason for his belief. Because of this, the available cartographical material on this subject has not been exhausted, nor relied upon to any great extent in this report. Nevertheless, a few maps have been examined to determine the date of discovery of the islands, for, if an old map describes a region which actually does exist with reasonable geographical accuracy, it is evidence that its existence was known at the date the map was made.

The historical and legal significance of maps in a case involving the determination of sovereignty over territory has been well stated by the court in the Palmas Island Case:

> "... only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas... . Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas....clearly marked as such, must be rejected forthwith, unless they contribute - supposing that they are accurate -

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to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps - as seems very often to be the case - but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.

"If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be." [3]

In the award of the Queen of Spain in the Aves Island Arbitration, it is said:

"Considering that for the authority of geographers to have any importance in matters of ownership it is necessary that all or a large part of them should be unanimous and agreed on the determination of the nationality of a given territory, and as this circumstance is wanting in the present case, other stronger and more valid titles are demanded than the opinion of the geographers." [4]

II. Principles

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[3] Award in the Palmas Island Case, United States and The Netherlands under Agreement of January 23, 1905, Hague Court of Arbitration (1928) pp.36-37.

[4] Award in the Aves Island Case, The Netherlands and Venezuela, June 30, 1865; Moore's Arb., 5037-5041 (translation).

II. Principles of Law

A. General International Law

The general principles of international law involved in the determination of sovereignty over territory are too well known to warrant a detailed discussion in this report. Only a brief summary will be given, therefore, of the law applicable to the cases under consideration.

As stated by Judge Moore:

> "Title by occupation is gained by the discovery, use, and settlement of territory not occupied by a civilized power. Discovery gives only an inchoate title, which must be confirmed by use or settlement." [5]

While this principle is generally admitted to be a fair statement of international law at the present time, it has been maintained that if the discovery took place during the time when international law recognized a perfect title by discovery alone, without settlement, no later change in law could affect this title, valid at the time acquired.

> "How far the mere discovery of a territory which is either unsettled, or settled only by savages, gives a right to it, is a question which neither the law nor the usages of nations has yet definitely settled. The opinions

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[5] I Moore's Digest 258-269; see also I Wharton's Digest, § 2.

> opinions of mankind, upon this point, have undergone very great changes with the progress of knowledge and civilization. Yet it will scarcely be denied that rights acquired by the general consent of civilized nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal, or the more just, views of after times. The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood at that time, and not by the improved and more enlightened opinion of three centuries later." [6]

This argument was advanced by the United States in the Palmas Island Case but the Court said:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer

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[6] Mr. Upshur, Sec. of State, to Mr. Everett, Oct. 9, 1843, MS. Inst. Great Britain, XV. 148, 148; I Moore's Digest 259.

> certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas...." [7]

This position is certainly as logical as the other, and is, moreover, one likely to obtain reasonably fair results. If the contrary were consistently maintained, it would in effect make occupation and settlement of all territory discovered before the nineteenth century unnecessary.

In connection with discovery, occupation and settlement, various problems of law arise, such as the intention to assume sovereignty, the nature and extent of occupation necessary, whether or not the territory has been abandoned so that it has become terra nullius and open to settlement again by some other nation, questions of contiguity and of continuity of territory, and of prescription. To consider these problems in the abstract

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[7] Op. cit. Supra, Note 3.

is not very illuminating and they will, therefore, be considered in relation to the particular facts. Certain general principles may, however, be stated at this point.

It is said that there must be an intent to claim sovereignty, expressed by the claimant state. This intent may be either expressed or implied, and may be emphasized in any number of ways.[8] Consequently, no rule of thumb can be given as to what is or what is not an expression of this intent but it must be determined by reference to the facts of each case. Acts of possession are particularly significant in this connection, especially acts indicating an exclusive exercise of power by the claimant state.

With respect to the amount of occupation necessary, it is reasonable to assume that this must depend to some extent upon the nature of the territory in question, and its suitability to habitation. In the Palmas Island case, the court said:

> "...the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent..."[9]

In the Aves Island Case, however, which relates to an uninhabitable

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8 Oppenheim, International Law, (1920) Vol. I, § 222

9 Op. cit. supra. Note 3, p. 58.

uninhabitable island, it was said:

> "...even though the Island is not capable of permanent habitation due to the immersion to which it is exposed, if the Dutch had occupied it with the intention of acquiring it, judging it abandoned, they would have constructed some building and tried to make the Island constantly habitable, neither of which things were effected." [10]

It is impossible to state a priori what constitutes abandonment, especially abandonment of a guano island. It is said that "abandonment can only result from the expressed manifestation of the will," and that it will not be presumed:

> "When the thing whose abandonment is alleged in order to rationalize occupation belongs to the dominion of a nation, still more rigorous becomes the necessity of causing the act to rest on some positive and express manifestation of the will of the owner, showing that he does not desire to continue in possession, for in questions of territorial dominion abandonment is not to be presumed. The presumption is not that the thing is a res nullius....." [11]

Nevertheless, where there has probably been no occupation or use of any kind whatsoever, and certainly none of an exclusive character, of an island in the high seas for about 250 years, it is reasonable to conclude that the territory has been abandoned by the discoverer.

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[10] Op. cit. supra, note 4.

[11] I Moore's Digest 300; See also Charles Cheney Hyde, International Law, (1922) Vol. I, § 119.

It is then open to acquisition by settlement by some country other than that of the discoverer or his successor in interest. [12]

Again, when the question of contiguity is discussed, it must be in relation to particular facts, and not in the abstract. To base a claim of sovereignty on discovery and settlement of adjacent territory, the degree of contiguity must be considered, and the purposes for which the territory in question might be used. The theory depends in part upon the idea that unsettled territory must be held by the nation occupying contiguous territory because, if held by a second nation, it would be a menace to the security of the first.

> "...on principle, unoccupied islands in the open sea and beyond the territorial waters of a State are not, by reason of their relative proximity to its shores, to be deemed a part of its domain. Such was the contention of the United States in 1852, with respect to the Lobos Islands off the coast of Peru." [13]

Where the contiguous territory is about 75 miles away, and is moreover but a small island or group of islands over 200 miles from the main land, and different in character from the disputed territory, the principle of contiguity alone

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[12] Hyde, op. cit. supra, note 11, p. 197; Oppenheim, op.cit. supra, note 8, p. 384, 405.

[13] Hyde, op. cit. supra, note 11, Vol. I, p. 173; See I Moore's Digest, 265-267.

alone would not seem sufficient to confer territorial sovereignty.

The doctrine of prescription in international law is described by Mr. Hyde as follows:

> "By operation of the principle known as that of prescription, the uninterrupted exercise of dominion over territory for a sufficient length of time by one State is deemed to destroy the value of adverse claims of sovereignty preferred by any other, and thus to clothe the occupant with such rights of property and control as may once have been vested in such a claimant... It...implies that when the existing occupant first entered into that possession, the territory was already subjected to a dominion which had been productive of rights of property and control, and was not, therefore, at that time res nullius, or available for acquisition by means of occupation." [14]

The possession of the territory in question must be uninterrupted and undisturbed, on the theory that the dispossessed State must acquiesce in the occupation before he can lose his rights. The length of time this possession must be maintained before sovereignty can be acquired by prescription depends on the circumstances of the case. Although the existence of this doctrine in international law has been disputed, it would seem to be generally admitted now as a legal mode of acquiring territorial sovereignty.[15]

B. The

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[14] Hyde, op. cit. supra, note 11, Vol. I, p. 192.

[15] See I Moore's Digest 293-297; Hyde, op. cit. supra, Note 11, Vol. I, pp. 192-196; Oppenheim, op.cit. supra, Note 8, pp. 400-403.

B. The Guano Act of 1856.

1. The Act, Amendments, Origin, Use.

As the United States claims these islands under the Guano Act of 1856, as well as under general rules of international law, a brief history of the Guano Act, its origin and application is necessary. The Act of August 18, 1856, reads as follows:

> § 5570. "Whenever any citizen of the United States discovers a deposit of guano on any island, rock,or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.
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> § 5571. ~~1412~~. "The discoverer shall, as soon as practicable, give notice, verified by affidavit, to the Department of State, of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government, before the same shall be considered as appertaining to the United States.
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> § 5573. "The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks,

or

or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding $8 per ton for the best quality, or $4 for every ton taken while in its native place of deposit.

§ 5574. "No guano shall be taken from any island, rock, or key mentioned in section 1411 of this title, except for the use of the citizens of the United States or of persons resident therein. The discoverer, or his widow, heir, executor, administrator, or assigns, shall enter into bond, in such penalty and with such sureties as may be required by the President, to deliver the guano to citizens of the United States, for the purpose of being used therein, and to none others, and at the price prescribed, and to provide all necessary facilities for that purpose within a time to be fixed in the bond; and any breach of the provisions thereof shall be deemed a forfeiture of all rights accruing under and by virtue of this chapter.

§ 5575. "The introduction of guano from such islands, rocks, or keys shall be regulated as in the coasting trade between different parts of the United States, and the same laws shall govern the vessels concerned therein.

§ 5576. "All acts done, and offenses or crimes committed, on any island, rock, or key mentioned in section 1411 of this title, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States; and shall be punished according to the laws of the United

States

States relating to such ships or vessels and offenses on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks, and keys.

§ 5577. "The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns.

§ 5578. "Nothing in this chapter contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys, after the guano shall have been removed from the same." 16

Section 5572 was added to the original act in 1872, and reads as follows:

§ 5572. "If the discoverer dies before perfecting proof of discovery or fully complying with the provisions of section 1412 of this title, his widow, heir, executor, or administrator, shall be entitled to the benefits of such discovery, upon complying with the provisions of this chapter. Nothing herein shall be held to impair any rights of discovery or any assignment by a discoverer recognized prior to April 2, 1872, by the United States." 17

That portion of the statute which forbids the export of guano from the islands to countries other than the United States, and subjects the vessels engaged in the guano trade to the laws regulating the coasting trade has

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16 Rev. Stat. § 5570-5578; 48 U.S.C.A. § 1411-1419

17 Rev. Stat. § 5572; 48 U.S.C.A. § 1413.

has been amended from time to time. By an Act of March 3, 1865, so much of the Act of 1856 "as prohibits the export [of guano] is hereby suspended in relation to all persons who have complied with the provisions of Section 2 of said Act for two years from and after July 14, 1865." [18] This suspension was reenacted for five years from July 14, 1867, by the Act of July 28, 1866;[19] by the Act of March 15, 1878, for five years from that date,[20] and again by the Act of April 14, 1884, for five years from that date.[21]

The Guano Islands trade is also affected by the Act of April 19, 1902, which stated that provisions of Sections 4197-4200 of the Revised Statutes, requiring statements of the quantity and value of goods carried by vessels clearing from the United States to foreign ports, should be extended to and govern, under such regulations as the Secretaries of Commerce and Labor shall prescribe, in the trade between the United States and Hawaii, Porto Rico, Alaska, the Philippines, Guam, "and its other non-contiguous territory," and shall also govern the trade conducted between these islands and

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18 13 Stat. 494, § 8.
19 14 Stat. 428, § 3.
20 20 Stat. 30
21 23 Stat. 11

and territory and other parts of the United States.[22]

The origin of this statute may be found in the rather sudden demand for guano as a fertilizer which arose in the nineteenth century. Although guano was used as manure by the Incas of Peru centuries ago,[23] and was described in a work of Garcelasso de la Vega, published in Lisbon in 1609,[24] European interest was not aroused until A. von Humboldt took samples of it to Europe in 1804, and called attention to the deposits in the Chincha Islands.[25] Even then it was not exported in any quantities until about 1840, when its great value as a fertilizer became to be recognized in Great Britain, and a few years later in the United States.[26] There a demand was created among the agricultural groups of Maryland, Virginia, and Delaware, who brought pressure on Congress to take steps to secure an adequate, cheap supply of guano.[27] At that time practically

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22. 32 Stat. 172, C 637; 48 U.S.C.A. § 1486.

23. The Encyclopedia Americana (N.Y. 1932) Vol. 13, Guano;

24. C. L. Bartlett, Guano (Boston 1860) pp. 3-4.

25. T. S. Palmer, A Review of Economic Ornithology in the United States (in Yearbook of U. S. Dept. Agriculture, 1900), p. 274.

26. Encyclopedia Americana, op. cit. supra., note 23.

27. C. L. Bartlett, op. cit. supra, note 24.
(Peruvian guano was said to benefit crops several years after its application to a field, and was alleged to be more beneficial in content and more efficient than ordinary barn manure.)
See also petitions of citizens of those States, S. Ex. Doc. 25, 35 Cong. 2 Sess. (Feb. 5, 1859), p.28; 6 Miscl. Let. re Guano.

practically the only guano on the market was Peruvian. The Peruvian Government owned its guano concessions and controlled the price, paying off its national debt from the profits derived from granting exclusive privileges to certain companies to engage in the guano trade. In 1853 guano was selling at from $50 to $55 a ton at Baltimore and Richmond, and efforts were made through diplomatic channels to induce Peru to lower the price. With this end in view a treaty of July 13, 1850, was finally negotiated, but was rejected by Peru, and it seemed hopeless to make any further attempts to induce Peru to lower prices. Furthermore, some of the high price was probably due to the necessity of the long voyage around Cape Horn, and even if the trade restrictions were removed, it would still be expensive to transport it to the eastern United States.[28] This condition of affairs led to the adoption of the Guano Act of 1856.

The form of the Act was influenced by another factor. Certain enterprising Americans had already discovered new deposits of guano on islands in the Pacific and Caribbean, and wanted protection. In 1854 Philo Shelton

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28 H. Ex. Doc. 70, 33 Cong., 1 Session, Mar. 1, 1854;
S. Ex. Doc. 25, 35 Cong., 2 Session, Feb. 5, 1859;
S. Ex. Doc. 80, 31 Cong., 1 Session, Sept. 27, 1850;
S. Ex. Doc. 59, 31 Cong., 1 Session, June 29, 1850.

was expelled from Aves Island, where he was engaged in removing guano, by an armed Venezuelan force. Shelton submitted a memorial to the United States. He saw that his claim could be effectively contested by Venezuela unless the United States asserted ownership over the Island; so he proposed a statute very much like the one which was finally adopted.[29] Another memorial submitted to Congress by the counsel for the American Guano Company also urged the adoption of legislation "which, conceding the right of eminent domain to rest with the United States, will impart a generous exception to the discoverers and their assignees, and at the same time secure a beneficial interest in the discoveries to the citizens of the country generally." [30] This memorial urged the United States to acquire Bakers Island, and alleged that: "we can as a nation take and maintain jurisdiction over them (uninhabited islands),

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29 Papers submitted by Henry Sanford, S. Ex. Doc. 25, 34 Cong., 3 Session, pp. 35-93;
S. Ex. Doc. 10, 33 Cong., 2 Session, pp. 465-466.
Under Shelton's statute, however, the right of sovereignty and eminent domain of a derelict or abandoned guano island, discovered and occupied by an American citizen, would automatically vest in the United States unless expressly declined. The statute as adopted requires an affirmative acceptance of some sort.

30 Senate Misc. Doc. No. 60, 34 Cong., 1 Session, Vol. I (May 28, 1856), p. 6.

islands), protect and confirm the private rights of the citizens making the discovery, and their assignees." [31]

After the passage of the act, during the thirty years from 1869 to 1898, 283,871 tons of guano, valued at $3,229,832 were brought into the United States from the islands. The production was apparently very irregular, varying from a minimum of 1176 tons in 1890 to 17,930 in 1878.[31a] No guano was brought in from 1901 to 1904, inclusive. This probably lead to the notice to the Collector of Customs in 1906, directing them to discontinue giving quarter yearly reports of guano brought from the islands, but to make a special report of the quantity and value of any guano which should hereafter be brought to the United States.[31b]

The decline in the guano trade was probably due to the introduction of cheaper substitutes, such as the large deposits of phosphate of lime discovered in the Carolinas and Georgia.[31c] Also, there may have been some disappointment in the quality of the guano obtained from the islands. Guano of commercial value is limited chiefly

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31 Id. pp. 7-8.

31a T. S. Palmer, op. cit. supra, note 25, p. 275.

31b Notice to Collector of Customs, Oct. 19, 1906, Dept. of Commerce and Labor Circular No. 132; (Information obtained by telephone from Mr. Asmuth, Com. Dept., July 1, 1932).

31c The Pacific Guano Co., Cambridge 1876 p. 24; Report of H. Com. on Ways and Means, Mar. 2, 1891, Doc. 4040, No. 2890, 51 Cong., 2 Session.

chiefly to the hottest, driest tropic regions, a few degrees from the equator, because it solidifies there, undergoing little chemical change, whereas in the rainier climates the soluble salts are dissolved. Peruvian guano came largely from the Chincha Islands where it never rains at all, so that the deposits accumulated for centuries and retained the most valuable substances.[31d] In the Caribbean, however, there is considerable rainfall. Although samples of guano vary greatly in composition, there are, roughly speaking, two kinds: nitrogenous, such as that from the Chincha Islands, and phosphatic, like that taken from Bakers Island. The latter has lost all of manurial value except the insoluble phosphate of lime.[31e] The ingredients especially prized are ammoniacal salts, phosphoric acids, and other alkalis, particularly potash.[31f]

2. Interpretations of the Guano Act.

Since its passage, the Guano Act of 1856 has been interpreted several times by the judicial branches of the United States Government. The whole act was construed by

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31d The Encyclopedia Americano, supra, Note 23; E. Bartlett, Guano, Its Origin, Properties and Use. N. Y., 1845, page 21.

31e T. S. Palmer, op. cit. supra., note 25, p. 274.

31f Encyclopedia Americana, op. cit. supra., note 23.

by Attorney General Black in an opinion of June 2, 1857, in which he made the following points:

A. "The President may consider an island as appertaining to the United States, and protect it accordingly, upon the following facts being established.

1. That a deposit of guano has been discovered upon it by an American citizen.

2. That it is not within the lawful jurisdiction of any other government.

3. That it is not occupied by the citizens of any other government.

4. That the discoverer has taken and kept peaceable possession thereof in the name of the United States.

5. That the discoverer has given notice of these facts as soon as practicable to the State Department, on his oath.

6. That the notice has been accompanied with a description of the island, its latitude and longitude.

7. That satisfactory evidence has been furnished to the State Department showing that the island was not taken out of the possession of any other government or people.

B. "After the President shall be satisfied on these points, and shall thereupon decide to treat the island as an appurtenance of the United States, he may allow the discoverer or his assigns to keep exclusive possession for the purpose of taking off the guano and selling it." Before this right can be given he must file the necessary bond conditioned: "that he will provide all needful facilities for getting the guano off within a certain time; that he

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will give up his possession whenever his right to hold it shall be lawfully terminated; and, generally, that he will obey the laws of the United States on the subject." 32

C. The discoverer holds his interest at the pleasure of Congress. He is in effect a tenant at will of the nation.33

D. "The President is not bound, against his own conviction of public policy to declare any particular island as appertaining to the United States. The law forbids him to do so before the prerequisites above mentioned are complied with, and leaves it to his discretion afterwards. But he may do it without waiting for an adverse claim to be set up." 34

In a second opinion, Attorney General Black decided that the case submitted to him was one permitting the exercise of the President's discretionary power, under the Act of 1856, and decided which of the two claimants was the proper party to give the bond. The facts were as follows: Parker, an American citizen, saw Johnson's Island in 1852, and visited it in the PALESTINE, in March 1858, when he stayed on the island seven days, planted flags and tablets, and removed a half ton of guano. The Pacific Guano Company, of which Parker was a stockholder, was formed June 8, 1858, to extract guano from Johnson's Island. On June 14, one Allan arrived

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32 9 Op. Atty. Gen. 30, 30-31.

33 Id. 31-32.

34 Id. 32.

at the Island and raised the Hawaiian flag. The PALESTINE, belonging to the Pacific Guano Company, arrived July 22, 1858, took on guano, and left two men on the islands. Later the company built houses, ships, and made surveys. On July 27 the Hawaiian Government issued a proclamation declaring its sovereignty over the island. On these facts the Attorney General held that: since actual possession and occupation were express conditions of the Act, and symbolical possession was not enough, neither Parker nor the Pacific Guano Company had any rights before the second visit of the PALESTINE; since Allan's visit resulted in "nothing more than empty ceremonies that could vest no jurisdiction over the island in the Hawaiian Government," and the Hawaiian proclamation was made when the island was "in the actual occupation of American citizens," and further "an actual continuous occupation having been kept up by the company from July 22," the case was within the Guano Act.[35] On the second point he held that: "the conditions of the act of Congress were not performed by Parker, and if the case stood upon his acts, there is no case for the discretionary power of the President."[36] Parker got no right under the

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[35] 9 Op. Att'y Gen. 364 (July 12, 1859), 368-369.
[36] Id. p. 369.

the Act by seeing the islands in 1852 because: "Speculative claims anticipating discoveries are not sanctioned by the act of Congress. No claim under the Act of 1856 can have any earlier inception than the actual discovery of guano deposit, possession taken, and actual occupation of the island....whereon it is found."[37] Whether Parker's representative had an equitable share in the company's profits was for the determination of a judicial tribunal. Finally, the Pacific Guano Company was found to be the proper party to give the bond.[38]

In an opinion on the petition of one Kendall, for protection in his possession of Cay Verde, an alleged guano island, the Attorney General stated that: as the island is "distinctly asserted by the British government to be within its jurisdiction," Lord Lyons having given notice that removal of guano by an American would be considered "not only a trespass, but a hostile aggression," the President "has no right under the law to annex the island to the United States, or to put any American citizen in possession of it,until the diplomatic question raised by the British minister shall be finally settled, and not then unless it be settled in our favor." [39]

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[37] Id. 369-370.

[38] Id.

[39] 9 Op. Att'y Gen. 406 (Dec. 14, 1859, Black). (Italics added.)

In an opinion of Attorney General Speed, it was held that the Secretary of State should not revoke a proclamation issued by the State Department allowing the United States Guano Company to take guano off Howland's Island, but the question of whether or not this could be done was expressly left undecided. The Attorney General said that only the President could question the Secretary's authority to issue the proclamation; that it need not be signed by the President or sealed by the United States seal since the Act does not specify how the President shall manifest his decision; and that a proclamation issued by the State Department was the usual procedure, and added: "It has been the general practice of the Government, by proclamation, to make known to the world any action of the Government that may affect other governments, or the citizens or subjects of other nations." [40] He held also that if the proclamation was obtained by fraud, as was alleged, the claimant could obtain relief in the courts, but that the State Department could not determine that question.[41]

When British ships took guano from Baker's Island to Europe in 1866, the Attorney General held: "By this act,

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[40] 11 Op. Att'y Gen. 397 (Speed, Nov. 13, 1865), 399.
[41] Id. 400-402.

act (Act of 1856), the Government secures to the discoverer (a citizen of the United States) of guano upon an unoccupied island, rock, or key, the exclusive use thereof, but upon the condition that the guano is for the use of citizens or residents of the United States, and that the guano is to be brought away in vessels having coasting-licenses, and under the laws regulating coasting trade. Under the Act of 1856, guano could not be taken from one of those islands, rocks, or keys, to any foreign country; or, as the act declares, that, for the purposes of the trade, they shall appertain to the United States, it may be properly said that the act prohibits the export of guano." He found, however, that the amendment of 1865 (suspending the export prohibition) repealed by implication the section making the guano trade a coasting trade, and that,in accordance with this amendment, all who had complied with Section 2 of the Act of 1856 might, for two years after July 14, 1865, "export guano in any vessels that other merchandize can be exported in from the United States." [42]

The next interpretation of the Act is found in Whiton v. Albany and Narragansett Insurance Companies.[43] In

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[42] 11 Op. Atty. Gen. 514 (Speed, June 27, 1866), 514, 515.
[43] 109 Mass. 24 (1871).

In that case the question was raised as to whether Navassa Island was a guano island, because the insurance policy sued upon prohibited voyages from all guano islands, except the Peruvians, and the ship had been lost on a voyage from Navassa. The court held the evidence of the Secretary of State's proclamation issued to the discoverer, confirming his interest in Navassa, was improperly excluded:

> "The public acts and documents offered in evidence tended to show that the United States had acquired, and had asserted against foreign governments, a title in the Island of Navassa by discovery and lawful possession, as authorized by the Law of Nations." [44]

Johnson's Island was again discussed in 1873, when Mrs. Parker, the discoverer's widow, claimed rights under the Amendment of 1872.[44a] The Attorney General held Mrs. Parker had no rights as successor to Parker because: "The compound character required by the act of 1856 of one at once discoverer, possessor, and occupant, never was sustained by Mr. Parker in severalty." [45] When he died, his rights as an outsider perished, and any other citizen was entitled to carry out the policy of the Guano Act in regard to these islands, except that the

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[44] Id. 31

[44a] Supra, note 17.

[45] 14 Op. Atty. Gen. 608 (Phillips, May 8, 1873), 609.

the rights of the Pacific Guano Company had vested, and were therefore saved by the Act of 1872. In answer to the allegation that the company had forfeited its rights by abandonment, the Attorney General said: "Upon application at the office of the Secretary of State I am told that it has been the course of that Department to recognize such islands only while occupied for the purpose of procuring guano and, therefore, upon a cessation of such occupancy, they became open again to discovery, possession, etc. If this allegation or forfeiture be true, I suppose that the islands are again subject to original proceedings before the Secretary of State. In such event, Mrs. Parker will be obliged to take possession and occupy before she can be heard..." [46]

In Jones v. United States,[47] a case in which the defendant appealed to the Supreme Court from a conviction of murder committed on Navassa Island, the court upheld the Circuit Court's jurisdiction, under § 5576 of the Guano Act, and declared the act constitutional. In an opinion by Mr. Justice Gray, it was said that the sections of

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[46] Id. 610.
[47] 137 U. S. 202 (1890).

of the act after the first two "manifestly apply only to islands which the President has determined shall be considered as appertaining to the United States."[48] He said further:

> "By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession, (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines), of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel. lib. 1, c. 18; Wheaton on International Law (8th ed.) §§ 161, 165,176, note 104; Halleck on International Law, c. 6 §§ 7, 15; 1 Phillimore on International Law (3d ed.) §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) §§ 266, 277, 300; Whiton v. Albany Ins. Co., 109 Mass. 24, 31." [49]

In the Jones Case, the court declared that Navassa "must be considered as appertaining to the United States."[50] The evidence on which this conclusion was based included: the memorial of the discoverer, his request for protection, his bond, the United States' reply to Haiti rejecting that

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[48] Id. 210.
[49] Id. 212.
[50] Id. 224.

that Government's claim, the usual proclamation issued to the discoverer by the Secretary of State, the fact that an armed vessel was ordered to the island to protect the discoverer, subsequent letters again rejecting Haiti's claim, and the Secretary of the Treasury's circular and list of guano islands under coasting trade regulations. Finally the court found that evidence of loading guano on foreign ships (a procedure which was a breach of the discoverer's bond) should be excluded because the breach of a condition of the bond affected only the discoverer's rights and not the dominion or jurisdiction of the United States.

In Duncan v. Navassa Phosphate Company,[51] the court refused to allow the petition of the widow of the discoverer of Navassa Island for dower in the island. The court decided the case on the theory that the discoverer's interest was an estate at will, not ~~one~~ subject to dower at common law. In this connection it was said that Duncan's interest was "a license to occupy the island for the purpose of removing the guano; this right cannot last after the guano is removed; by the express terms of the act it may be terminated at any time 'at the pleasure of Congress'."[52] The ruling of the lower court was affirmed,

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51 137 U. S. 647 (1891).

52 Id. 651-2.

affirmed, but for entirely different reasons. The lower court's decision was based on the theory that neither the discoverer nor the United States had acquired any rights in the land itself, and that the Guano Act did not give the United States any territorial sovereignty or domain over guano islands.[53] The opinion of the Supreme Court, however, and not that of the lower Federal Court, represents the law of the case, and should be regarded as controlling.

In Downes v. Bidwell[54] it was held that Porto Rico was "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[55] In Mr. Justice White's concurring opinion the guano legislation was cited as an example sustaining this decision. He said "numerous islands have been brought within the dominion of the United States under the authority of the act of August 18, 1856..."[56] and quoted from the opinion in the Jones case. Mr. Justice Fuller, however, in his dissenting opinion, appeared to regard the guano islands as terra nullius, and was unable to see "why the discharge by

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53 Grafflin v. Nevassa Phosphate Co., 35 Fed. 474 (1888).
54 182 U. S. 244 (1901).
55 Id. 287.
56 Id. 304.

by the United States of its undoubted duty to protect its citizens on terra nullius, whether temporarily engaged in catching and curing fish, or working mines, or taking away manure, furnishes support to the proposition that the power of Congress over the territories of the United States is unrestricted."[57]

In 1918 Acting Attorney General J. W. Davis considered the case of Swan Islands. He concluded, on the facts before him, that: "the United States has never acquired sovereignty of any kind or to any extent over the Swan Islands by reason of the provisions of the Guano Islands Act of August 18, 1856."[58] In reaching this conclusion he argued: that the only action taken by the United States was the filing of the bond in 1863, and the lists the Secretary of the Treasury sent to the Collectors of Customs; and that there had been no "exetive action" taken by the President or Secretary of State "which could be construed as an exercise of the discretion conferred upon the President by the Act of August 18, 1856, such as to amount to a declaration that the Swan Islands were considered as appertaining to the United States."[59] After the first period of occupation of the islands

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57 Id., 372-373.
58 31 Op. Atty. Gen. 216 (Davis, Feb. 8, 1918), 220.
59 Id., 219.

islands from the discovery of guano in 1857 to abandonment by Adams (the agent of the discoverer's assignee) in 1904, Mr. Davis concluded that the President would have been authorized to exercise his discretion, but that all right acquired by virtue of the discovery ceased at the time of this assignee's abandonment. As to the second period of occupation, from Adams' return (in his own right, 24 hours after abandoning the island as agent) to date, the Guano Act had not been complied with, no bond having been filed, and the President could not exercise his discretion under the Act. The Attorney General concluded, however, that the United States had acquired certain rights over the islands because of their continuous occupation by American citizens, and said "no other country has any proper claim to these islands, and the United States Government may at any time assert its sovereignty over them by appropriate action...", the form of which is for the executive and legislative branches of the Government to decide.[60] Finally he held that the Swan Islands Company, the assignee of Adams, had certain inchoate rights under the Guano Act depending on its filing a bond, but "such rights would have been limited merely to the protection of the United States during the operation of the said islands.

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[60] Id., 223.

islands. The property rights of said company, irrespective of the Guano Islands Act, are dependent upon the assumption of sovereignty over the islands by the United States Government. Upon such assumption, there can be no doubt that the rights of the company in the lands occupied and improved by it will become at least so equitably fixed as to warrant some provision for a compensation by the Government."[61]

This opinion was in part overruled by Attorney General Sargent, who held: that the certificate issued by the Department of State to the discoverer's assignees who filed the bond was such "executive" action as was required by the Guano Act; and that Mr. Davis would have agreed had he been supplied with a copy of this certificate.[62] Mr. Sargent concluded: "the certificate of Secretary Seward, dated February 11, 1863, that all the steps required by the Act of 1856 have been complied with, is 'equivalent to a declaration that the President considered the island as appertaining to the United States'", and that "evidence of the exercise of this discretion (of the President) may be manifested by the

announcement

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61 Id., 224.

62 34 Op. Atty. Gen. 507 (Sargent, June 24, 1925). It seems clear from Mr. Davis' opinion that he would have reached the same conclusion as Mr. Sargent if he had seen the certificate.

announcement or certificate of the Secretary of State."[63] He added that the abandonment by the company was of no effect so far as United States sovereignty is concerned, once that sovereignty had been extended.

Other government officials have also expressed themselves on the meaning and effect of the Guano Act. Numerous examples might be given of denials that any territorial rights were exercised by the United States over guano islands. For instance: In 1914, replying to a request for a list of the possessions of the United States, Mr. Osborne, Assistant Secretary, said: "there are also a number of guano islands appertaining to the United States under the Guano Act of 1856, but over these the United States claims no sovereign or territorial rights. It simply protects, under these acts, United States citizens who discover guano thereon, or their assigns, in the prosecution of their enterprise which extends only to the appropriation and disposal of guano."[64] On the other hand, the Department has usually refrained from such expressions and merely quoted the

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63 Id., 514. The Jones Case, supra, note 47, is relied upon in this opinion of the Attorney General.

64 Osborne, Ass. Sec'y, to Mr. Grosvernor, June 29, 1914, 811.014/14; See also Phillips, 3rd Ass. Sec'y, to Mr. H. M. Walker, July 13, 1914, 811.0141/13; Seward, Sec. of State, to Don Ignacio Gomez, Min. of Nicaragua and Honduras at Washington, Dec. 10, 1868, MS 2 Notes to Nic. Beg'n 9.

the statute of 1856, and given brief accounts of the record history of the islands under examination.[65]

More important than these statements, as an indication of the government's interpretation of the Guano Act, are certain positive acts of jurisdiction and control exercised by the United States under the authority of the Act. In July, 1858, an armed vessel was ordered to Navassa Island to protect American citizens removing guano from interference by Haiti.[66] The Jones Case shows that the United States could and did assume jurisdiction over crimes committed on a guano island recognized as "appertaining to the United States."[67]

The instructions sent out from time to time by the Secretary of the Treasury to the Collectors of Customs indicate that the provisions of the Guano Act relating to the coasting trade were to be enforced with reference to guano from the islands listed. These lists were compiled by the Treasury Department from the bonds, and were approved by the State Department before being made public. There are three such lists, dated respectively August 23, 1867, February 12, 1869, and ~~December~~ October 12, 1871.

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65. See W. Phillips, Ass. Sec'y to Mr. Edward Alexander, April 21, 1917, 811.0141/20; A.A. Adee, 2nd Ass. Sec'y, to Mr. Henry Trumore, Oct. 11, 1912, 811.0141 Se 6/5.

66. Jones v. U. S., supra, note 47, 221.

67. Id.

A copy of the latter was sent the Secretary of State, July 3, 1890, and another copy to the Assistant Secretary of the Treasury, September 16, 1893.[68]

In the Petrel Guano Co. v. Jarnette, the District Court enforced the coasting trade provisions by refusing to permit the recovery of freight for guano shipped from Roncador in a British vessel.[69]

Although the primary purpose of the guano legislation was to enable American citizens to obtain guano, and not territory, nevertheless, it is clear that the United States has the power to acquire territorial sovereignty over islands occupied under the Guano Act. This conclusion is supported not only by the interpretation of the act by United States officials, but by the act itself. The condition that the island be uninhabited, and not within the lawful jurisdiction of any other country indicates that other conditions of the act are inconsistent with such jurisdiction. They have been so regarded by foreign governments protesting against the occupation of islands within their jurisdiction by American citizens under the act.[70] Furthermore, the language

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68 First list in 6 miscl. let. re Guano, 2237-2238; others reported in I Moore's Digest 566-567.

69 Petrel Guano Co. v. Jarnette, 25 Fed. 675 (Cct. ct. E. D., N. C. 1885).

70 See British attitude in regard to Cay Verde, supra, note 39.

of the last section of the act, providing for the privilege of abandoning the islands after the guano is removed, implies the United States may have obtained possession, and may retain it.

It is also clear that the United States has exercised this power in certain cases. The various jurisdictional acts performed by the United States under the authority of the Guano Act indicate an intention to assume exclusive control over the islands. Whether the United States has thus acquired territorial sovereignty over the islands on Serrana, Serranilla, Roncador, and Quito Sueño Banks depends upon the facts and history relating to these particular islands, as does the secondary question of whether that sovereignty has been retained, provided it was once acquired.

III. History of Territories Adjacent to The Islands.

The history of the Caribbean region from its discovery by Columbus to the present time has been studied frequently, and in detail, but there is practically no mention of anything taking place on Serrana, Serranilla, Roncador and Quito Sueno before the middle of the nineteenth century, although it is plain that their existence was known by the beginning of the seventeenth century. Apparently the islands themselves had no history before modern times. This inference is reasonable in view of their tiny size and comparative uselessness to the early adventurers and settlers who were interested chiefly in seeking gold, forming plantations, and trading with the Indians along the coast of the Spanish Main.

Since the claims of Colombia, Nicaragua, and Honduras are all based in part upon discovery, and upon settlement of and sovereignty over adjacent territory, it is necessary to consider the early history and development of the Western Caribbean region. Moreover, as there is very little relating to the individual islands before 1850, it is not necessary to consider the development of each group of islands separately before that date.

A. Discovery

In the exposition of the Colombian claim it is alleged that Columbus discovered the islands of San Andres and Providence in 1492, the native name for one of the islands being Abacoa. It is assumed that this discovery included the discovery of Santa Catalina, Roncador, Quito Sueno, Courtown, Alburquerque and Serrana, "all joining to form the archipalago or group of Old Providence."[71] In the Nicaraguan claim to Serrana, it was said that the name Serrana showed the island must have been discovered by Spaniards.[72]

It is impossible that Columbus could have discovered either San Andres or Old Providence Island on his first voyage.[73] Historians have concluded that in 1492 Columbus reached the Bahamas first, landing on several of those islands, proceeded to the northeast coast of Cuba and San Domingo, and then sailed home to Spain without having entered the Inner Caribbean Sea.[74] There is some doubt as to which of the Bahamas Columbus found on this voyage. The Colombian

contention

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71. Jukio Rengifo, Colombian Chargé d'Affaires, to the Sec'y. of State, January 18, 1893, 8 MS Notes from Colombia.

72. Seward, Sec!y. of State to Don Ignasus Gomez, Min. of Nic. at Washington, December 10, 1868, 2 MS Nicaraguan Leg'n. 9.

73. Old Providence is often referred to as Santa Catalina which is really another very small island, so close to Old Providence as to have been once connected with it by a bridge. In this report the name Old Providence will be used to designate both Old Providence proper, and the islet Santa Catalina.

74. Roselly de Lorgues-Christophe Colomb. (Paris, 1856) Vol.

Vol. 1, pp. 279-280; map by Fernandez de Naverette, (Madrid, 1825) in F. R. Hart, Admirals of the Caribbean. (1922); W. Shepherd, Historical Atlas, (N.Y.1911) p.105.

contention that islands named Providence and San Andres were discovered may be correct, but they are not the Colombian islands of Providence and San Andres in the Southwestern Caribbean Sea, but British islands of the same names, in the Bahamas. There are two adjacent islands in the Bahama group named Providence,(New Providence, now better known as Nassau, after its largest town) and Andros. There is also one named Abaco, which may have been the Abacoa mentioned by Colombia.[75] There is a story that the Bahama island of Providence was once called Abacoa, and afterwards received the name of Providence from an Englishman who had been twice shipwrecked on its coast.[76]

There is no evidence that Columbus discovered either Old Providence, or San Andres, the Colombian islands, or any

75. Imperial Atlas of the World, Rand McNally (1917) 3; Navarette's Supra; Raggeveens Atlas, Map of Bahamas dated 1675 (an island called Abacoa is charted).

76. Thomas Jefferys, The West India Islands (London, 1775). Mr. Jeffries states that the island was abandoned by the English in 1708 and that it was a pirate refuge until 1718 when Great Britain sent a governor armed with a party, whereupon "they left off pirating and soon became a regulated colony".

any of the four groups of islands under consideration on any of his succeeding voyages. On the second voyage, 1493-94, he skirted the Lesser Antilles, and explored the southwest coast of San Domingo, Cuba and Jamaica; on a third, in 1498, he touched at the mainland of South America Trinidad and San Domingo. On neither of these trips did he come any where near the disputed islands. On the fourth voyage, however, he skirted the south coast of Jamaica, sailed north by the Cayman Islands, and then across the Caribbean Sea to the Gulf of Honduras, and down the coast of the mainland to the narrow part of the isthmus, and then directly north to Little Cayman Island and Cuba.[77] It is just possible, but not probable, that he may have sighted some of the banks in question, but it is quite certain he did not land on them. No mention is made of any such islands by Columbus, and as the voyage was far to the north of them, and as he was in a terrible storm all the way to Cape Gracias a Dios, which he reached on September 14, 1503, it is impossible for him to have seen them before then. After reaching the Cape, he kept very close to the mainland and could not have seen them on his southward journey. Furthermore, he was searching for the northeast passage, and for gold and would not have paid any

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77. Sheppard, op. cit. supra, Note 74. Navarette's map, op. cit. supra, Note 74.

any attention to these barren islands, had he come near them.[78]

While it is apparent Columbus did not discover either Old Providence, San Andres, or the islands under consideration, it is probable that they were first noticed by Spaniards, who were the first to explore that region. In 1508 Vincente Pinzon and Juan Diaz de Solis explored along the Bay of Honduras and Cape Gracias á Dios.[79] Other Spanish explorers skirted the mainland and the isthmus in the first decade of the sixteenth century, and some of them may have seen the islands. It was not until 1565 that the English navigator, Sir John Hawkins, entered the Caribbean Sea, to be followed in 1585 by Sir Francis Drake.[80] By that time the Spanish trade with the mainland was under way, and the navigators must have known of these banks, with their dangerous, hidden reefs.

It is evident, moreover, that the islands were known under their present Spanish names, by the 17th century, for they

78. Roselly de Lorgues, op. cit. supra, Note 74, pp. 209-217; Charles Paul MacKie, The Last Voyages of the Admiral of the Ocean Sea (1892), pp. 437-465.

79. Sheppard, op. cit. supra, Note 74; The Encyclopedia Americana (N.Y. 1932) Vols. 22 and 25.

80. Hart, op. cit. supra, p. 14.

they are found on maps of that period.[81] In a map of the Antilles by Herrera, dated 1601, the positions of "La Seranilla" and "La Serrana" are given.[82] In a Dutch Atlas of 1675 there are two maps showing the islands: On one Serranilla and Serrana are given, Santa Catalina and San Andres; on the other, all four of the banks are given on a map devoted exclusively to them. On this map, one tiny island is marked on Serranilla, none on Quito Sueno, and two on Serrana. Between Serrana and Quito Sueno is a reef marked "Blinde Clippe", to the south is "Roncadores", and to the right of Santa Catalina, is a reef "Musquettiers".[83] This map shows that the existence of the banks and islands under Spanish names was well known by 1675, but gives no other indication who discovered or first charted them, and no indication of sovereignty.

On most of the maps examined there has been no indication of sovereignty over these islands, although the Spanish names for them are always given, with slight

variations

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81. The story of the Englishman, shipwrecked on Roncador in 1636 shows that the island was known as Roncadores at that date, but that it was not frequented by ships. See infra, note 103.

82. Sen. Ex. Doc. 38, 40th Congress, 2d session, serial No. 316, Plate 15.

83. Raggeveen, Atlas Van De West Indien (Amsterdam, 1675).

variations in spelling. They appear on maps of the 18th century made by cartographers of various nationalities. All are given on a French map of 1731,[84] and directions and distances are given in detail in a British Atlas of 1771.[85] On Jefferys' chart of 1775 (British),[86] an alternate name for Serrana, "Pearl Islands," is given, and on an American map printed by Laurie and Whittle in 1794, two aliases for Serrana are given, "Pearl Islands" and "English Bank", and there is a notation to the effect that Quito Sueno is called "Guana Reef" by the Baymen.[87] On 19th century charts there is little change. Arrowsmith's chart of 1816 gives all the islands, and adds the aliases "Pearl Island" and "Guana Reef" for Serrana and Quito Sueno, respectively.[88] On a French map of 1870 Quito Sueno is also given

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84. d'Anville, Map of West Indies (1731), reprinted in C. H. Haring, The Buccaneers of the West Indies in the 17th Century. (N.Y. 1910)

85. Captain Joseph Smith Speer. The West India Pilot (London, 1771), pp. 49-50. (Captain Speer notes that he "served upwards of twenty years in the West Indies.")

86. op. cit. Supra, Note 76.

87. Laurie & Whittle, Complete Pilot for the West Indies, (1794) No. 8, No. 19.

88. Thompson, New General Atlas (1816).

given the names "Oupre L'Oeil", and "Guana".[89] Hobbs' chart of 1849-56 shows a detailed knowledge of the channels around the cays and of the character of the islands.[90] Publications of the Hydrographic Department of the United States in 1893, based on British surveys of 1833-35, likewise show an intimate knowledge of the geographic features of the islands.[91]

Although no exact information has been found as to the discoveror of Roncador and Quito Sueno, Serrana and Serranilla, nor even as to the discoveror of the larger, more attractive islands of Old Providence and San Andres, it is reasonable to conclude that, while Columbus did not discover them, it is probable that some Spanish navigator did in the early 16th century. The fact that the Spanish explored this region first, and that the names appear to have been Spanish, with little variation, from earliest times, supports this conclusion. However, it is not proved.

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89. Brué and Vuelleincin, Map of the West Indies (1870?)

90. J. S. Hobbs, General Chart of the West Indies (London, 1849, additions 1856).

91. H. O. Pub. Nos. 1372, 1373, 1374, (War and Navy Depts. 1893); H. O. Pub. No. 1489 (Washington, 1895).

b. Settlement

There has never been any real settlement on any of the small islands under discussion, and the early history of the region relates chiefly to the Spanish Main and to the islands of Old Providence (Santa Catalina) and San Andres. Since, Colombia insists that their history includes that of Roncador, Quito Sueno, and Serrana, and probably Serranilla, a brief summary of it will be given, from the 17th century to the present time.

Old Providence was first occupied in 1630 by English Puritans sent out by the Providence Company, a British corporation, under the direction and management of the Earl of Warwick and his associates. Upon the arrival of the colonists Old Providence was uninhabited, except for a few Dutchmen who were permitted to remain ~~on~~, but not to control the colony.[92] The colony was to have been a home for Puritans, but it was such a convenient place from which to attack the richly laden ships coming from the Spanish Main, that the Puritans soon indulged in piratical raids.[93]

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92. A. P. Newton, The Colonizing Activities of the English Puritans (New Haven, 1914), pp. 52-97.

93. Newton, op. cit. supra, Note 92, 152. Small boats from Guatemala loaded with gold and bound for Cartagena (where the cargo was reloaded onto the heavily guarded Spanish galleons) passed close to Old Providence and could be easily attacked.

This profitable occupation was encouraged by the home company, and in January, 1636, after the repulse of the Spanish attack on Old Providence in 1635, the British King granted the settlers Letters of Reprisal.[94] The home government kept in fairly close touch with the colony,[95] and from Old Providence two other British settlements were made, one by Captain Sussex Cammock, on Cape Gracias á Dios, and one by Captain Samuel Axe, on a large island of the Mosquito [Moskito] Kays, between Old Providence and the Cape, soon after 1630.[96] The British were finally expelled from Old Providence in 1641, by the Spanish.[97]

The Spaniards remained comparatively undisturbed in the Caribbean from that date until the British captured Jamaica in 1665.[98] Old Providence was garrisoned by the Spanish and used as a penal settlement until its recapture in 1665 by the English privateer, Captain Edward Mansfield.[99]

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94. Id. pp. 195-207.

95. Id. pp. 216-223. Two Governors were sent to Old Providence from England.

96. Id. pp. 140-165.

97. Id. pp. 143-144.

98. Id. p. 321.

99. Op. cit. Supra, Note 84, pp. 135, 137.

The Spanish recaptured it in 1666, but the Englishman, Sir Henry Morgan, took it again in 1670, and used it as a basis for his attack on Panama.[100] Although the Spanish regarded Morgan as a buccaneer, the council of Jamaica gave him a vote of thanks and he later was appointed Governor of Jamaica.[101] After about 1680, the Jamaicans turned against the buccaneers, who took to attacking all ships and not just Spanish ships, thereby becoming pirates in the eyes of all. It is said that the pirates used Old Providence Island as a base, but after the French attack on Cartagena in 1697, their power became less and less, and in the first quarter of the 18th century they were finally driven from the seas.[102]

Although the islands of Old Providence and San Andres, and the Mosquito coast and Keys were occupied and their possession was disputed from time to time during the 17th century, no evidence has been found of any use of the islands of Roncador, Quito Sueno, Serrana, or Serranilla. There is, however, an account of the shipwreck of an Englishman and four others on the island of Roncador in 1636. The Englishman had escaped from Old Providence in a small boat, intending to attack one of the Guatamala frigates, but he was blown

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100. Id. pp. 139, 163.

101. Op. cit. Supra, Note 74, pp. 91-101

102. Id. p. 169.

blown off his course and his boat was wrecked on "the tiny sandy islet of Roncador or 'The Snorer'". The Island is described as barren and without fresh water and frequented by sea birds in the breeding season. His companions died, but the Englishman managed to live there two and a half years, subsisting on fish, birds, and rain water, until he was rescued by a Dutch ship which brought him into Old Providence in February, 1639.[103] The fact that it was over two years before he was rescued shows how little the island was frequented at that time, and the account of Roncador indicates that these Keys were then, and probably for many years to come, regarded only as barren, uninhabited, useless rocks.

During the Eighteenth Century Old Providence seems to have been practically deserted. Jefferys, in 1775, spoke of English trading establishments along the Bay of Honduras and the Mosquito coast, (on Cape Gracias á Dios), where the Indians "admit no other Europeans in their country", and of Blewfields Lagoon, as frequented by people from Jamaica in search of mahogany, fish, and turtles "both on the coast and in the adjacent islands". Old Providence, however, was said to be "at present uninhabited", and Jeffereys added that, as it is one of the best islands in the

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103. Newton, op. cit. supra, Note 92.

[illegible]. Note 78, pp. 13-17.

the Indies, though small, "it is surprising that Old Providence has been forsaken and desolate since the last century".[104]

During this century the Spanish were endeavoring to push the English back from the coast. By the Convention of London, of July 14, 1786, between England and Spain, it was agreed that English subjects should evacuate the Mosquito country and its adjacent islands.[105] This was not carried out at once, however, and the English have retained what is now British Honduras to this day.

From the beginning of the Nineteenth Century, Spain exercised a loose control over Old Providence, San Andres, and the adjacent territory on the mainland, except for two years, from 1806 to 1808, when the British held Old Providence.[106] By the Royal Order of November 30, 1803, the "islands of San Andres" were separated from Guatemala and attached to the Vice-Royalty of New Granada, "together with all the coast comprised between Chagrés and Cape Gracias á Dios." Since it is upon this Royal Order that Colombia bases its title to the islands of Roncandor, Quito Sueno, and Serrana, it is well to quote it in full:

> "The Junta of Fortifications and Defense of the Indies in opinions rendered September 2 and October 21 last, has expressed its views
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> on

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104. Jefferys, op. cit. Supra, Note 76, pp. 16-17.

105. Estado Actual de La Cuestion de Limites entre Nicaraua y Colombia (1925), (Translation).

106. Rengifo, op, cit. Supra, Note.71

> on the development, populating and defense of the islands of Sanit Andres, their separation and the separation of that part of the Mosquito coast extending from Cape Gracias á Dios inclusive as far as the River Chagres of that Captaincy General, and incorporation with the new Kingdom of Granada; and the King having agreed with the opinion of the Junta, I am sending to Your Lordship [The Captain General of Guatemala] upon his Majesty's order (and also to the Viceroy of the said Realm) a copy of the said opinions for your knowledge and execution so far as it concerns you." 107

After the separation of the Spanish colonies from Spain in the early Nineteenth Century (1815-1821) (107A) Colombia, or New Granada, as it was then called (1831) (107B) continued to control, to some extent, San Andres and Old Providence Islands, and Courtown and Albuquerque Keys. In 1868 the American Minister at Bogota wrote that San Andres and Old Providence were formerly under the nominal jurisdiction of Bolivar, but that a year ago they were ceded to the United States of Colombia and "for fifteen years previous Bolivar had exercised no jurisdiction over them". He adds that: "the only government that has existed there is that of Justices of the Peace, elected by the inhabitants"; that they trade in coconuts, cattle, turtles and tortoise shells, and that "there is but little or no

communication

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107. Limites entre Nicaragua y Colombia, op. cit. supra, Note 105.

107A. Phanor James Eder, Colombia (N.Y. 1813) p. 38.

107B. Id. p. 39.

communication between them and Colombia, which is utterly unable to govern them.[108] In 1893, the Colombian Minister to the United States notified the Secretary of State that American vessels were bringing salt into Old Providence and San Andres contrary to Colombian law, and would hereafter be treated as smugglers. The United States replied that American shippers would be notified.[109] Evidently Colombian sovereignty over these two islands was not disputed by the United States at that time, nor has it been since, though Nicaragua did dispute it.[109A]

At the beginning of the Twentieth Century the islands of San Andres and Old Providence were said to be under the government of Cartagena, Colombia, but apparently little attention had been paid to them. There were then some two or three thousand inhabitants, mostly English speaking, who exported coconuts to the United States. Americans published the only paper; there were no schools, and but three chapels, two Protestant and one Catholic. The Catholic Priest was appointed from Baltimore, and not be the Archbishop of Cartagena; only stamps of the Republic of Panama were used, and the sole connection with South America

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108. Sullivan, U.S. Min. at Colombia, to Seward, Sec'y. of State, Mar. 30, 1868, II For. Rel. 1868, 1061. Jennett was probably mistaken in saying, in 1869, that Old Providence was then claimed by the British. (See Jennett' Declaration, June 5, 1869, 5 MS. Miscl. Lat. re Guano.

109. Rengifo, minister of Colombia, to Gresham, Sec'y. of State, Aug. 4, 1893 (transl.), 8 MS Col Notes; Gresham, Sec'y. State, to Rengifo, Aug. 8, 1893, VII MS Notes to Col. 211.

109A. See Infra, Notes 112, 113.

South America was via Colon.[110] In the Central American Pilot, for 1927, San Andres is called the seat of the government of the territory comprising San Andres, Old Providence, "and the neighboring cays". The population of the whole group is listed at three thousand, chiefly American planters and Jamaica negroes.[111]

In 1919, Nicaragua presented to Colombia a claim to San Andres and Old Providence as well as to the Mosquito coast Keys, but Colombia refused to consider it.[112] Nevertheless, Nicaragua in September, 1925, took pains to refute the Colombian position that the Royal Order of 1803 gave Colombia sovereignty over these islands and the Coru Islands, maintaining that this Order was for specific purposes of defense and development only, and not for the determination of boundaries, and that the Colombian occupation and government of the islands was de facto only and not de jure.[113] The dispute between Colombia and Nicaragua was finally settled by a treaty of 1928 in which Colombia recognized "the sovereignty and absolute dominion" of

Nicaragua

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110. Harrison, U.S. Chargé at Bogota, to the Sec. of State, July 18, 1912, (821.014).

111. Central America and Mexico Pilot, H.O. No. 130, (1927) p. 239.

112. Glenn Stewart, LA, Memo, May 19, 1919 (821.0141/6); Philip, U.S. Min. to Colombia, to Sec. State, Oct. 18, 1919 (811.822/68); Summerlin, U.S. Amb. to Mexico, to Sec. State, Aug. 29, 1922 (821.014/10).

113. Limites entre Nicaragua y Colombia, op. cit. Supra, Note 105.

Nicaragua over the Mosquito coast between Cape Gracias á Dios and the San Juan River, and over the Mangle or Corn Islands", and Nicaragua recognized Colombia's sovereignty over "San Andres, Old Providence, Santa Catalina, and all other islands, small islands and Keys which are part of the San Andres archipelago." This treaty, however, provided that "the cays of the Roncador, Quito Sueno, and Serrana, the dominion over which is in litigation between Colomiba and the United States of America, are not included in this treaty". No mention was made of Serranilla.[114]

Although the first real settlement of Old Providence and San Andres was made by the English in 1630, the subsequent history of the islands leads to the conclusion that they are now Colombian, as are the keys to the south, Courtown and Albuquerque, and, further, that they were Colombian in the middle of the Nineteenth century, at the time of the "discovery" of Guano on the islands under consideration by James W. Jennett, an American citizen. Colombia's ownership of the islands of Old Providence and San Andres was not recognized by Nicaragua until 1928, however.

Whether or not the keys to the north, on Roncador, Quito Sueno, Serrana, and Serranilla banks, should be included in the so-called Providence, or San Andres archipelago depends upon various factors. There is no definite formula for the determination of when an island is or is not

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114. Treaty of 1928 between Colombia and Nicaragua (811.0141019/381,382).

not a part of an archipelago, and when it should or should not belong to the country owning the nearest island. Occupation and use of the islands may be as significant as their location in the determination of their legal status. Consequently the history of each of these groups of islands must be considered separately.

IV. History of Roncador and Quito Sueno.

A. Geography

Roncador bank is a coral bank about seven miles long and three and a half miles wide, and Roncador Key, (or Cay) at latitude 13° 15' N., longitude 80° 40' W., is on the north end of the bank. It is about twelve feet above water and 600 by 630 yards in size, and is composed of sand and coral without trees or bushes, but with some guano on it. Brackish water may be obtained by digging wells, but there is no good drinking water on the island. This island is entirely surrounded by a barrier reef, but on the western edge of the bank there is good anchorage.[115] Roncador is about 75 miles east of Old Providence, 60 miles south of Serrana, and over 200 miles east of the nearest mainland, the coast of Nicaragua.

The above description differs considerably from that given by James W. Jennett, the American citizen who claimed to have discovered guano on the Roncador in December, 1866. Jennett alleged that there was a good harbor and anchorage, fresh water, plenty of firewood, fish and turtles.[116] His statements

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115. Central American Pilot, op. cit. supra. Note 111, pp. 232-233; E. M. Douglas, Boundaries, Areas, Geographic Centers, and Altitudes of the United States and the Several States (Wash. 1930) p. 55.

116. J. W. Jennett's Declaration of Discovery, May 26, 1869 Enclosure, Lincoln and Willard to Fish, Sec'y. State, Aug. 9, 1869, 5 MS. Miscl. Let. re Guano.

statements were supported by the declarations of Henry Stevens and George Nelson, first and second mates on the schooner PETREL in which the discovery was said to have been made.[117] From their descriptions and from Jennett's water-color map of the island[118] it would appear to be a comfortable place in which to live. As these statements were made by interested parties, however, and as they are contradicted by later, authenticated descriptions, it is believed that they are not only inaccurate but entirely imaginative.

Quito Sueno is described as a coral bank about 34 miles long and 8 miles wide, 7 to 20 fathoms under water, with patches of dry land at intervals. It is at latitude 14° 29' N., longitude 81°08' W. (position of the United States light).[119] In 1920 the Commissioner of Lighthouses reported that there were only coral heads visible above the reefs,[120] and in 1926 it was reported that the only objects above water over the whole bank were the light and a small rock eight miles south

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117. Declarations of Henry Stevens, and of Geo. Nelson, May 28, 1869, 5 MS Miscl. Let. re Guano.

118. 5 MS Miscl. Let Re Guano.

119. Central American Pilot, op. cit. supra, Note 111, pp. 233-234; Douglas, op. cit. supra, Note 115, pp. 54-55.

120. Report of E. M. Trott, Sup. of Lighthouses, and Conway, Commissioner of Lighthouses, July 10, 1920, (811.822/94)

south of it, though it was noted that a key might soon be formed at the northwest end of the bank.[121] The bank is thirty miles north of Low Key, at the north end of Old Providence Reef, and 41 miles west of Southwest Key of Serrana, and about 130 miles from the Nicaraguan coast.[122]

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121. Central American Pilot, op. cit. supra. Note 111, pp. 233-234.

122. Ibid. Jennett's description of this bank is quite different from the above, and apparently completely imaginative. He alleges that the island was 2 1/2 by 1 mile in size, with fresh water, firewood, eggs, birds and turtles, and about 50,000 tons of guano, and that two men lived on the island three months. (See Infra, Notes 132, 135).

b. The Claim of The United States

It has been seen that Roncador Key was probably discovered by Spaniards in the Sixteenth Century, but that so far as can be ascertained, it was not occupied during the Sixteenth, Seventeenth or Eighteenth Centuries, except by a shipwrecked Englishman,[122A] though it might have been used to a certain extent by fishermen in search of turtles and eggs. That it has been used by fishermen in the Nineteenth and Twentieth Centuries is quite certain. A fisherman's hut may usually be seen on the Key, though it is probably only occupied by the men at intervals from March to August, during the turtle breeding season. There is also a coral wall at the north end of the Key, six feet high and 40 by 50 feet square.[123] Colombia alleges that the fishermen are Colombian citizens from San Andres and Old Providence,[124] but it is probable that, because of its situation and character, fishermen from all the surrounding territory, including Jamaica and Nicaragua, have used the island.

The American claim to Roncador arises through occupation under the Guano Act. The first claimants to the discovery

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122A. Supra, Note 103.

123. Id. pp. 232-3; Report of E. M. Trott, op. cit. supra, Note 120.

124. Rengifo, op. cit. supra, Note, 71.

discovery of guano were not, however, recognized by the State Department as having any interest in the island. On May 19, 1857, J. W. Fabens filed a memorial alleging that he had discovered guano on Roncador during his residence as United States Consul at Cayenne, French Guiana, from 1844 to 1849, and during his subsequent residence at San Juan de Norte. No affidavits or bonds were filed with this claim and it was apparently disregarded.[125] On February 26, 1870, Isiah Respess, Daniel McCarter, and Jeremiah Abbott filed a declaration of discovery of Roncador in 1858, made by Captain Abbott of the schooner LOUISA, chartered by Respess. It is alleged that Abbott made several trips to Roncador; that he performed ceremonies showing possession of the island was taken in the name of the United States; that he brought away cargoes of guano and sold them in Baltimore; and that claimants had a ship ready to sail to load guano in 1870 and had not abandoned their claim.[126] No answer could be found to this letter, and apparently no action was taken by the Department.

On

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125. John Davis, Acting Sec'y., to Samuel Sloan, Aug. 26, 1883, 148 MS. Dom Let. 67; See also Memo., unsigned and undated, in 6 MS Miscl. Let Re Guano.

126. Jeremiah Abbott, Declaration of Discovery, Feb. 26, 1870, 5 MS. Miscl. Let. re Guano; Davis to Slaen, supra, Note 125.

On August 9, 1869, J. W. Jennett's declaration of discovery of a deposit of guano on Roncador on December 7, 1866, was filed with the State Department. He alleged: that he landed, built a house, set up a flag-staff, dug a well, carved his name and date on the rocks; and that the island contained about 100,000 tons of guano; that it was not in the jurisdiction of any other country or inhabited by citizens of any other country; and that it had a good harbor and anchorage, fresh water, firewood, and plenty of fish and turtles.[127] The declarations of Henry Stevens and George Nelson, both dated May 28, 1869, and obviously made under Jennett's supervision, substantiated Jennett's declaration.[128] On October 7, 1869, Jennett filed additional evidence of his occupation of the island, alleging that on August 31, 1869, he landed two men on Roncador, with provisions for three months, the men having been hired by Jennett to stay on the island until his return.[129] This statement is verified by the declaration of Captain Eaden, of the LAVINIA, the boat which supposedly took the men to the island. The Captain added that the men could live comfortably on the island at least six

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127. J. W. Jennett, supra, Note 116.

128. Stevens and Nelson, Supra, Note 117.

129. J. W. Jennett, Memorial, Oct. 7, 1869. 5 MS. Miscl. Let re Guano.

six months although they only had provisions for three, because there were plenty of natural resources.[130] Jennett likewise submitted to the State Department a verified copy of the contract made with the two men on board the LAVINIA, August 18, 1869.[131]

There is no declaration of discovery of guano on Quito Sueno before J. W. Jennett's, dated March 10, 1869. In this declaration he alleged that he discovered the island on December 3, 1866, that it was not occupied, etc., that he built a house, dug a well, etc., that there were about 50,000 tons of guano on the island, that he took on board a boat-load and left the island, January 12, 1867.[132] In an earlier statement dated June 30, 1866, relating to his first trip on the schooner PETREL, he alleged that he took a ton of guano from Quito Sueno and that:

> "Some one had been there and taken away a cargo, from appearances, several years previous, but could not find good fresh water, fit for drinking, but would do for cooking purposes. This island being small and not much shelter does not afford a good harbor, or break the sea sufficient to make it smooth, thus guano could not be lightered here only in fine weather." [133]

This

130. Eaden, Declarations, Sept. 2, 1869, and Aug. 31, 1869, 5 MS Miscl. Let re Guano.

131. Contract, Aug. 18, 1869, 5 MS. Miscl. Let. re Guano.

132. Jennett. Declaration of Discovery, Mar. 10, 1869, 5 MS. Miscl. Let re Guano. This declaration is supported by statements of Henry Stevens and George Nelson, as in the Case of Roncador, Ibid.

133. Jennett, Statement of June 30, 1866, 5 MS Miscl. Let. re Guano.

This does not coincide very well with his later declaration about Quito Sueno,[134] nor with his additional evidence relating to the voyage in 1869 on the LAVINIA. In the latter declaration Jennett says he landed two men with three months' provisions on Quito Sueno on March 10, 1869.[135] This statement is supported by a copy of the contract of hire,[136] and by a certificate of Captain Eaden, September 11, 1869, in which he says he found the two men on Quito Sueno, where they had been since March, and gives a glowing account of the island.[137] Jennett may have confused Quito Sueno with Serrana,[138] but as he also described Serrana in detail, and drew elaborate pictures of all the islands, it is more probable that he merely lied. Obviously no one could live from March to September on Quito Sueno bank, almost all of it being completely under water. All of Jennett's statements are therefore of very doubtful veracity, especially those describing the character of the islands.

The

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134. Supra, Note 132.

135. Jennett, Declaration, Oct. 7, 1869, 5 MS. Miscl. Let. re. Guano.

136. Contract dated Sept. 7, 1869, 5 MS. Miscl. Let. re. Guano.

137. Certificates of Eaden, Sept. 7 & Sept. 11, 1869, 5 MS Miscl. Let. Re. Guano.

138. See Samuel Schwenk to Wm. Wharton, Ass. Sec'y. June 28, 1892, 5 MS. Miscl. Let. re Guano. Schwenk says Quito Sueno was sometimes called Quito Serano, and that Jennett confused them.

The State Department, however, accepted and approved his bond for $200,000 for Roncador and Quito Sueno (also Pedro, and Petrel islands) on November 27, 1869,[139] and on November 30, 1869, a proclamation was issued to Jennett by the Secretary of State, Hamilton Fish, certifying that:

> "James W. Jennett is entitled in respect to the guano upon the said islands and keys to all privileges and advantages intended by that act to be secured to citizens of the United States, while and so long as he abides by, and fulfills the conditions of said bond, and the requirements of the Act of Congress aforesaid." [140]

This proclamation has never been found in the State Department, due no doubt to the fact that it was customary to give the original to the discoverer himself, no copy being retained, but there is every reason to believe that the proclamation was issued. (See J. C. B. Davis, Acting Sec., to Mr. D. M. Carter, Mar. 29, 1870. 83 MS Dom. Let. 612; Hamilton Fish, Sec. of State, to Mrs. Henrietta Stevens, May 10, 1870, 84 MS Dom. Let 426; J. B. Moore, Third Ass.Sec., to J. W. Jennett, Nov. 19, 1889, 5 MS Miscl. Let. re Guano; S. K. Schwenk, to Brown, Chief Clerk, June 30, 1892, 5 MS. Miscl. Let. re Guano; Wm. Wharton, Acting Sec. to S. K. Schwent, June 23, 1892, 187 MS Dom. Let. 49; A. A. Adee, 2nd Ass. Sec., to Schwenk, Feb. 26, 1904, 272 MS Dom. let. 485.)

After

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139. Lincoln and Willard, Att'ys to Jennett, to Fish, Sec. of State, Nov. 26, 1869, and C. B. Davis to Lincoln and Willard, Nov. 27, 1869, 5 MS. Miscl. Let re Guano.

140. Copy of the Proclamation, enclosure in S. K. Schwent to A. A. Adee, Ass. Sec., Mar. 17, 1904, 5 MS. Miscl. Let. re. Guano.

After the issuance of this certificate, some guano was removed from Roncador by Americans, but there is no evidence that any guano was taken from Quito Sueno, probably because there was no guano there. Jennett took guano from Roncador in 1883;[142] in July and August, 1884, he removed about 794 tons for shipment to the United States;[143] and in 1885, three or more cargoes were removed by the Petrel Guano Company and some one is said to have actually occupied the island in behalf of the company.[144] The Colombian Minister himself reported that Mr. Edward Bailey, an officer of the Colombian Guano and Phosphate Company, engaged laborers at Jamaica in January, 1891, took them to Roncador, excavated 950 tons and shipped 350 from the island. He left twelve men on the island awaiting his return, and after four months, seven of them left in a boat and five others disappeared. Two corpses were found on the island in March, 1892, by turtle fishermen from San Andres and Providence, and

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142. Jennett to Schwenk, Dec. 4, 1883. MS. 5. Miscl. Let.re Guano.

143. Jennett's Statement of Account, Aug. 23, 1884, enclosed in letter from David Harrison to R. W. Flournoy, May 25, 1932 (811.0141 C19 /76).

144. See Petrel Guano Co. v Jarnette, Supra, Note 69; Condert Bro. to Thos. F. Bayard, Sec. State, May 22, 1885, 5 MS. Miscl. Let. re Guano.

and the Prefect of San Andres who came to investigate the affair.[145] The Petrel Guano Company sued the Colombian Phosphate Company for its removal of Guano in 1891, and recovered.[146] After 1900, no guano was brought into the United States from any of the guano islands,[147] but some may have been taken to foreign countries. There is a possibility that the Caribbean Guano Company took guano off Roncador in about 1912,[148] but after that time probably none was removed by American citizens. The United States Consul at Bluefields, Nicaragua, reported in 1925 that guano deposits on Roncador and Quito Sueno "are not being exploited at present, according to information received; nor is there any contemplated project for their exploitation known to officials and others in the Providence Consular District."[149]

During the time guano was being removed from Roncador, numerous assignments of interests in the guano on both

Roncador

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145. Rengifo, op. cit. supra, Note 71.

146. Petrel Guano Co. v. Schooner Effie J. Simmons, Jan. 27, 1893, unreported case, copy enclosed in Harrison to Flournoy, May 25, 1932.

147. Supra, Chapter II, b.l. note 31 B.

148. E. A. Alexander to Redfield, Sec. Com., Mar. 8, 1911 (811.0141/20).

149. McConnico, U. S. Consul at Bluefields, Nicaragua, to Sec. St. Oct. 19, 1925, (844 d. 0141/3)

Roncador and Quito Sueno were made, the first in point of time being May 15, 1870, and the latest October 18, 1911.[150] The list of assignments, and apparent record title is given in the appendix, their only importance at this point being to show that at least as late as 1911 the American citizens interested in the islands did not consider that they had been abandoned.

Besides actual removal of guano from Roncador by American citizens other acts of a sovereign nature have been performed by the United States Government. First, Jennett's exclusive interest in both Roncador and Quito Sueno was recognized by the Secretary of State by the proclamation of November 30, 1869.[151] Second, both islands were included in the Treasury Lists of 1871 and 1890, directing Collectors of Customs to enforce the coasting trade provisions of the Guano Act with respect to these and other islands.[152] Although in 1876 a British company did remove guano from Roncador, contrary to the Guano Act,[153] in 1885 the District Court refused to allow recovery of freight for shipping guano from Roncador on the British ship IOLANTHE on the ground that the shipping contract was in violation of the Guano Act, and was, therefore, illegal and unenforceable.[154]

Finally

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150. See Appendix, infra.

151. Supra, Note 140.

152. 5 Miscl. Let re Guano; I Moore's Digest 567;6MS. Miscl. let. re. Guano, 2330.

153. Sir Adrian Bailie, Brit. Amb. to U.S. to Richardson, Sept. 11, 1926 (811.822/108).

154. Petrel Guano Co.v.Jarnette, Supra, Note 69.

Finally, in 1919, by Presidential Proclamation, the islands of Roncador and Quito Sueno were declared to be, pursuant to the Guano Act, "under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other government", and, were set aside for lighthouse purposes.[155] Self-operating lights were accordingly erected on the two banks in June, 1920.[155A] These are positive acts of sovereignty exercised by the United States Government over Roncador and Quito Sueno.

Before their effect can be measured, however, it is necessary to consider the diplomatic history of these islands. Both Colombia and Honduras claim them and the grounds for these claims must, of course, be discussed before any conclusions as to United States sovereignty can be drawn.

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155. Proclamation of Feb. 25, 1919, (Quito Sueno and Serrana), and Proclamation of June 5, 1919 (Roncador), signed by Pres. Woodrow Wilson, (811.822/106).

155A. Lansing, Sec. of State, to Philip. U.S. Min. to Col., Sept. 20, 1919 (cable), Oct. 16, 1919, (811.822/63,65).

c. The Claim of Colombia

The Colombian claim was first advanced officially on December 8, 1890, when the Colombian Minister at Washington addressed the following note to the Secretary of State:

> "The proper Colombian authority having been informed that Mr. J. W. Jennett, an American citizen, was working without permission of the Government of Colombia, the guano deposits on the islets of Roncador and Quito Sueno in the Archipelago of Providencia, inquired of said Mr. Jennett by what right he was thus proceeding, and the latter stated under oath that he was acting by virtue of a written permit to that effect, granted to him by the Government of this Republic.
>
> "The Government of Colombia, which has been informed of the undertaking referred to cannot credit such an assertion, since it has long known the justice and loyalty which characterize the acts of the Government of the United States, which would not comport with the concession of a permit to carry on operations on territory notoriously belonging to a neighboring and friendly nation, and being certain that there is some misunderstanding in the case which is necessary to be explained, it instructs me to make the proper investigations.
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> "In accordance with the above .....kindly inform me if the Government of the United States has in any way authorized Mr. J. W. Jennett to make use of the guano deposits referred to, which is the foundation of the matter in question." 156

The Secretary of State replied that Jennett's statement was "substantially correct", and quoted Section 5570 of the

act

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156. Don Julio Rengifo, Colombian Min. to the U. S. to Blaine, Sec. of State, Dec. 8, 1890. 8 MS. Colombia Notes.

Act of 1856. He summarized the basis for the United States claim: listing Jennett's declaration of discovery, the filing and approval of his bond, and the Treasury Department's List of 1871, which included Roncador and Quito Sueno among the islands "appertaining to the United States"; and added that in the twenty years since 1871 "no adverse claim of sovereignty was set up". He found that the Colombian claim could not rest upon territorial contiguity: since the nearest inhabited land was Old Providence Island, claimed by the British,[156A] which was 75 miles from Roncador, since Colon was 240 miles from Roncador, and since both Roncador and Quito Sueno lie nearer to Costa Rica, Honduras, and Nicaragua than to Colombia. He concluded that "the Department is also uninformed of any acts of occupancy and possession on which a title could be asserted by Colombia".[157]

On January 18, 1893, Colombia submitted the grounds upon which the claim was based, and it is the only detailed statement of that nature ever received by the Department.[158]

1. It is alleged that after the Secretary of State's note of

156A. The belief that Old Providence was claimed by Great Britain is derived from a statement to that effect made by Jennett, and Capt. Eden of the LAVINIA, Sept. 2, 1869, 5 MS Miscl. Let. re Guano.

157. Blaine, Sec. of State, to Don Julio Rengifo, Colombian Minister to U.S., Jan. 19, 1891, VII MS. Notes to Colombia 178.

158. Rengifo, op. cit. supra, Note 71.

of January 19, 1891, "the works undertaken in those islands appear to have been completely abandoned and to have been confined to the removal of guano without effecting any establishment whatever ..... not even an elementary establishment indispensable for the maintenance of a permanent occupancy" and it was thought that Mr. Jennett would not persist in continuing to work the guano banks. (It is to be noted that in the same document Colombia says the islands are unfit for any colonial establishment, and cannot be permanently inhabited.) It was discovered, however, that Jennett had not abandoned the islands, and the story of the discovery of the laborers hired by Mr. Bailey in 1891 is recounted.[158A]

2. Colombian sovereignty over the island was acquired by virtue of the discovery of the islands of Providence and San Andres by Columbus in 1492, and:

> "At a relatively short distance from them was found the island of Santa Catalina, the keys of Roncador, Quito Sueno, Courtown, Albuquerque and Serrano Banco, all joining to form the archipelago or group of Old Providence. In view of the situation in the vicinity of these islands and keys it is to be presumed that one and the same geological change caused them to rise to the surface of the waters, and that they have a continuous basis on the ocean bed."

3. Because of the occupation of Old Providence by Spain after 1660, and Colombia's control over the island since 1803, and the jurisdiction exercised by Colombia over the

Providence

158A. Supra, Note 145.

Providence archipelago as part of the Province of Cartagena since the revolution and the foundation of Colombia (New Granada), Colombia had perfected the territorial rights acquired by virtue of the discovery. In this connection emphasis is put on the Royal Order of November 30, 1803,[159] by which it is alleged the Providence archipelago, and the coast from Chagres to Cape Gracias á Dios was "annexed" to the Vicé-Royalty of New Granada. Mention is also made of an exploring expedition from New Granada, under one Don Miguel Patino, and of a map made by this expedition which "fixed the geographical position of the islands and keys which formed the Providence archipelago and naturally include Roncador and Quito Sueno.[160] 4. Since that time Colombian sovereignty and possession has been uninterrupted, except for a few isolated and illegal acts which were protested at the time by Colombia. One of these acts was the voyage of the American ship ST. LAWRENCE, in 1853, when guano was removed from Roncador, and taken to Baltimore, in spite of the order of the Prefect of San Andres that the ship was not to leave port. This action was said to have given rise to a Colombian decree of November 15, 1854, prohibiting removal of guano from the Providence archipelago, which was sent to the American Consul, Sanchez, by a note of

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159. Supra, Note 107.

160. This map has not been found.

of November 22, 1854.[161]

5. Jennett was not even the "discoverer" of guano, because old maps prove that the existence of guano on the keys was known at least before 1858, and Jennett, therefore, could not obtain rights even under the Guano Act.

6. The citizens of San Andres and Old Providence have visited the islands from time immemorial, staying on the keys during the turtle breeding season.

7. No protest against the American action was made before by the Colombian Government because it was ignorant of the Treasury List of 1871, no formal notice having been sent to Colombia. Moreover, that silence could not prejudice Colombian rights since prescription does not concede a title of dominion under international law.

8. Great Britain has no claim to Old Providence, which was always Colombian.

This memorial was never answered by the United States, because it was thought that an answer might prejudice the pending Costa Rica-Colombia boundary arbitration.[162] Colombia, however, did not let the matter drop. In a report of the Colombian Minister of Foreign Affairs to the Colombian Congress of 1892 it was said:

> "Certain traders of the United States have landed on the keys of Roncador and Quito Sueno, in the Colombian archipelago of Providence,

161. No copy of this Decree has been found in the Archives of the State Department.

162. Memorandum of A. A. Adee, attached to the Colombian note of 1893, 8 MS Colombia Notes; See infra, Note 165.

> Providence, and have taken away, without the permission of this Government, large quantities of guano which exist in those islands, and which is a part of the property of the Republic. Our Legation in Washington has complained of these acts, which constitute a violation of our territory and defraud the nation of a source of wealth, the improvement of which ought to be attended to at once.
>
> "There is no doubt that these islands are a part of the Colombian domain, since they form a part of the Providence archipelago, and although uninhabited, from lack of water and vegetation, they are still occupied, so far as the circumstances admit, by the inhabitants of the neighboring islands, who periodically visit them in search of tortoise shell. Moreover, the Government in past times, has made contracts renting the keys for the working of guano deposits, by that means exercising acts of public domain. The renewal of these contracts and the necessary steps to enable the authorities of Providence to maintain the national possession of the keys, would be a safeguard for their territory and would increase the public revenues." 163

In a similar report in 1894 the Colombian Minister for Foreign Affairs alleged: that "the Secretary of State declared that the permission granted to the extractors of guano to be of no value on Colombia proving its rights before 1869, the date when the permission was granted"; and that "abuses that were being committed by certain traders, who, without any permission from Colombia, export large quantities of guano from the islets of Roncador and

Quito

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163. Enclosure in Dispatch No. 374, J. Abbott, U.S. Min. to Colombia, to Foster, Sec. of State, Aug. 4, 1892, 49 MS Colombia. The Secretary of State acknowledged the receipt of this despatch and sent the American Minister at Colombia copies of the Colombian Minister's note of December 8, 1890, and the Department's reply of January 19, 1891. See Foster, Sec. of State, to Abbott, U.S. Min. to Col. Sept. 16, 1892, 18 Instructions, Colombia 326.

Quito Sueno;" and that the assertion that the island was res nullius was false, "as the islets are the property of Colombia by virtue of perfect titles of dominion and of public and repeated acts of possession. Roncador and Quito Sueno form part of the archipelago of Providencia belonging to the Republic, of which it has been in peaceful possession since its existence, as it was formerly owned by Spain; and besides the inhabitants of the neighboring islands make use of these islets for stations in certain periods of the year for the fishery of tortoise shells and to cultivate as much as possible that part of the territory."[164]

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164. Report of Colombian Minister of Foreign Affairs, Enclosure in Dispatch No. 75, Sleeper, U.S. Chargé at Bogota, to Gresham, Sec. State, Oct. 1894, 1894 For. Rel. 197-198.

In the same year, the United States proceeded to second a request made by Sweden and Norway for the erection of lights on Roncador by the Colombian Government. On October 30, 1894, the Secretary of State wrote to the Secretary of the Navy, stating that the Government of Sweden and Norway had recommended to the Colombian Government that a light should be built on Roncador, and that the United States had been asked if it had taken any similar action. The letter continued:

> "As you are probably aware, the Government of Colombia has recently moved to obtain from the United States an explicit recognition of its sovereignty over the various islands and cays belonging to or dependent upon the New Providence group, alleging in support thereof rights claimed to be derived through a certain Royal Order of Spain in 1803, conferring upon the Vice-Royalty of New Granada certain administrative powers over the Caribbean islands and coast as far north as Cape Gracias á Dios. This claim being involved in the still unarbitrated dispute between Colombia and Costa Rica, this Government is unprepared to take any step which might appear to sanction the Colombian contention in this regard, but as the de facto administration of the islands and coast in question has long been exercised without controversy by Colombian agents at New Providence, a request of the suggested character might be made by Colombia without prejudice to ultimate issues of right and solely in the interest of general navigation, should you concur with me as to the expediency of so doing." [165]

When

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165. Gresham, Sec. of State, to Sec. of Navy, Oct. 30, 1894, 199 MS. Dom. Let. 279. Evidently the Secretary of State was not then aware that the United States claimed any interest in Roncador.

When the Secretary of the Navy replied that a light would be a great aid to navigation, instructions were sent to the United States Minister at Colombia, transmitting the note from the Minister of Sweden and Norway of October 22, 1894,-" ..... it being understood by the Swedish Government that the dangerous rock in question is a Colombian dependency,"- and requesting the Minister to "inform the Minister for Foreign Affairs that this Government cordially commends the suggestion of the Swedish and Norwegian Government and would be gratified to learn that the establishment of this greatly needed light had been determined upon."[166]

The United States Minister, submitting the reply of Colombia, called the Department's attention to its inconsistent attitude:

> "It appears that the United States granted a license to certain traders to take guano from Roncador and other islands in the vicinity, and that the United States have never retired the license. The Minister of Foreign Affairs, calls especial attention to this matter in his last report to Congress, claiming that the islands belong to Colombia, and that the United States exceeded its proper rights in granting such a license. In the letter from the State Department, to this Legation, asking the Republic of Colombia to establish a light house on Roncador Reef, the Department claims that the Island is a part of the territory of Colombia. ....I...simply call your attention to the fact that in the letter to this Legation, in regard to a light-house,

it

166. Gresham, Sec. of State, to Jacob Sleeper, U.S. Min. to Colombia, Nov. 26, 1894, 18 Colombia Instructions 446.

> it is admitted that the island is in the territory of Colombia." [167]

The Colombian Foreign Minister replied in part as follows:

> "Wherefore and inasmuch as Roncador Reef is included in the Archipelago of San Andres and San Louis de Providencia, which is an integral part of Colombian territory, the Department of the Treasury is now making a study of the matter, and has requested certain data from the Departments of Bolivar, and Panama, which is necessary in order to come to a decision in regard to the matter."[168]

Upon receipt of this despatch, the State Department notified its Minister to Colombia that the request that Colombia erect a light -

> ".....did not profess to determine the question of territorial sovereignty.
>
> "This Department is aware that the claims of Colombia along the Caribbean coast are in controversy, and has no disposition to prejudge any question of Colombian right. As a fact, Colombia has exercised administrative powers over the principal island of the New Providence group, and we may properly take cognizance of this de facto occupation without considering the de jure title." [169]

Here the matter rested, so far as the diplomatic claims were concerned, until 1919. In 1915, however,

Colombia

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167. Luther McKinney, U.S. Min. to Colombia, to Gresham, Sec. of State, Jan. 19, 1895, 52 MS Colombia, No. 91.

168. Id., Enclosure No. 1.

169. Edwin F. Uhl, Acting Sec. to McKinney, U.S. Min.to Colombia, Feb. 28, 1895, 18 Colombia Instructions 466. The State Department still refused to see the point, and appears either to have been unaware of United States claims to Roncador, or to have admitted Colombia's right as between Colombia and the United States.

Colombia asserted sovereignty over the islands by granting an exclusive concession to a Colombian citizen, Mr. Uscategui, to extract guano from Roncador and Quito Sueno, Serranilla, and South West Cay (Serrana) "and to use them for certain other purposes for twenty-five years."[170] The Department replied to an American citizen reporting this concession, that the United States had "refused to acquiesce in Colombia's claim of title to the islands."[171] The question was apparently settled by a contract between the Colombian and a Mr. Mason, an American citizen, giving the latter an option on the exportation of guano from the above Keys.[172] The State Department wrote Mason May 2, 1920, enclosing the Presidential Proclamations of 1919 regarding Serana, Roncador and Quito Sueno, and adding: "You will observe from these Proclamations that these islands are considereed as under the jurisdiction of this Government."[173]

The second official Colombian protest followed the Presidential Proclamations of February 25, and June 5, 1919, declaring that, pursuant to the Act of 1856, Serrana, Quito Sueno and Roncador "are now under the sole and exclusive jurisdiction of the United States and out of the

jurisdiction

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170. Mr. Alexander to Redfield, Sec. of Com., Mar. 8, 1917 (811.0141/20); see also Philip, U.S. Min. to Col. to Sec. State, Oct. 25, 1919, and Jan. 10, 1920 (811.822/71, 83)
171. Phillips, Ass. Sec. to Alexander, Apr. 21, 1917 (811.0141/20)
172. Philip, U.S. Min. to Col., to Sec. of State, Feb. 7, 1920 (811.822/84).
173. A.A. Adee, 2nd Ass. Sec., to Edward Mason, May 5, 1920 (811.822/83)

jurisdiction of any other government", and reserving the Keys on these banks for light-house purposes.[174] The origin of these Proclamations is significant. On January 29, 1919, the State Department wrote the Commerce Department, in answer to an inquiry about the erection of lights on Courtown and Old Providence Islands, that the sovereignty over those islands was then in dispute between Nicaragua and Colombia, and that the State Department did not wish to take any action until the dispute was settled.[175] A request for haste from the Commerce Department,[176] led to a cable to the American Minister to Colombia asking him to get permission from the Colombian Government for the United States to erect lights on Courtown and Old Providence, and stating: "You will also inform the Government of Colombia that this request does not signify the taking of any attitude on the part of the United States Government toward the various claims concerning the sovereignty of the islands in question."[177] In May, 1919, Colombia finally sent a refusal to grant this permission, declaring that Colombia would

erect

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174. Supra, Note, 155.

175. Phillips. Ass. Sec. to Sec. of Com., Jan. 29, 1919 (811.822/32).

176. Redfield, Sec.of Com. to Phillips. Feb.7, 1919 (811.822/39

177. Polk, Acting Sec., to Philip, U.S. Min. to Col., Feb.12, 1919, (Cable, 811.822/38a).

erect the lights.[178] The United States had little faith that Colombia would do so, and as a result the Proclamations were issued, and the towers were erected on Roncador, Quito Sueno, and Serrana, and were in operation by June, 1919.[179]

In September, 1919, Colombia protested: asserting that these keys, Roncador, Quito Sueno, and Serranilla (although the light was on Serrana) belong to Colombia; noted that the United States had not requested permission from Colombia to erect these lights; called attention to the grounds for the Colombian claim, as stated in 1893, and to the alleged explicit recognition of Colombian sovereignty by the United States in seconding Sweden's request that Colombia erect a light on Roncador.[180] The State Department agreed to discuss the question of ownership in a friendly manner.[181] On June 17, 1920, Colombia again stated the grounds for its claim, listing: the United States recognition of Colombian sovereignty in 1895; the fact that many maps, American made,

show

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178. Phillips, Acting Sec., to Redfield, Sec. of Com. May 28, 1919 (811.822/54).

179. Supra, Note 155.

180. Hernando y Caro, Col. Min. of Foreign Affairs, to Phillip, U.S. Min. to Col., Sept. 13, 1919; Enclosure, Philip to Sec. of State, Sept. 17, 1919 (811.822/64).

181. Philip to Sec. of State, Nov. 4, 1919 (811.822/75).

show that the keys were within the jurisdiction of New Granada; that certain maps show that the existence of guano on these islands was known long before Jennett's discovery; and the guano concession to Mr. Uscategui, granted by Colombia in 1915.[182]

In 1926, Colombia again asserted jurisdiction over the islands by arresting British fishermen off Quito Sueno, charging them with illegal fishing in Colombian waters. The British Ambassador wrote the United States Secretary of State that, as Quito Sueno was an almost totally submerged and uninhabited rock forty miles from Old Providence, "His Majesty's Government are disposed to hold that a formation of this nature can not be regarded as subject to the sovereignty of Colombia"; and inquired whether the United States had asked permission of Colombia to erect a light on this rock, and "whether the United States Government in fact recognize Colombian sovereignty over Quito Sueno Bank."[183] The United States replied it had never asked such permission, and enclosed a copy of the Proclamation of February 15, 1919 "reaffirming" the position "that these islands and banks are under the sole and exclusive jurisdiction of the United States and out of the jurisdiction

of

182. Conversation, Col. Min. to U.S. and Dr. Rowe (LA), June 17, 1920 (811.822/88).

183. Sir Esme Howard, Brit. Amb. to U.S., to Kellogg, Sec. of State, June 4, 1926 (811.822/106).

of any other government."[184] The British note to Colombia stated: that because of the distance of the bank from the Colombian mainland, the water in the vicinity of the island was open water where any one could fish; that the allegation of Colombian sovereignty could not be sustained since the United States, because of its lighthouse, also claimed sovereignty; and that Great Britain preferred to wait until this question was settled, for the moment merely claiming that, since it was open water, British fishermen must not be interfered with.[185] The Colombian claim of sovereignty was then reiterated by the Colombian Minister in a conversation with a member of the State Department, August 23, 1926.[186]

The question was temporarily settled by an exchange of notes between the United States and Colombia, April 10, 1928. Before this agreement was made, the State Department was informed by the Commerce Department that the latter had no knowledge

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184. Kellogg, Sec. of State, to Sir Esme Howard, Brit. Amb. to U.S., June 12, 1926 (811.822/106).

185. Conversation, a member of the U.S. State Department and Mr. Balfour, of the British Embassy, Aug. 2, 1926 (811.822/108).

186. Conversation, Dr. Olaya, Col. Min. to U.S. and Mr. Stahler, LA, Aug. 23, 1926 (811.822/108).

knowledge of any statute which would "make it unlawful for Colombian fishermen to take fish in the waters appertaining to the keys, and the Department has no objection to such fishing in these waters."[187] The agreement left the question of sovereignty over Serrana, Quito Sueno, and Roncador undecided, and provided:

> "whereas both Governments have claimed the right of sovereignty over these islands; and whereas the interest of the United States lies primarily in the maintenance of aids to navigation; and whereas Colombia shares the desire that such aids shall be maintained without interruption and furthermore is especially interested that her nationals shall uninterruptedly possess the opportunity of fishing in the waters adjacent to those Islands, the status quo in respect to the matter shall be maintained and the Government of Columbia will refrain from objecting to the maintenance by the United States of the services which it has established or may establish for aids to navigation, and the Government of the United States will refrain from objecting to the utilization, by Colombian nationals, of the waters appurtenant to the Islands for the purpose of fishing."[188]

Since that treaty the United States has refrained from granting any license to American citizens to remove guano from the coast.[189] Although it was reported in 1932

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187. MacCracken, Acting Sec. of Com., to Sec. of State, Oct. 15, 1927 (811.0141 C19/22).

188. Treaty of April 10, 1928, U.S. and Colombia, Treaty Series No. 760 1/2; See also F. White, Ass. Sec., to David Harrison, June 30, 1932. (811.0141C19/84); Stimson, Sec. of State, to Paul Squire, U.S. Consulate Kingston, Jamaica, June 11, 1932 (Cable, 811.0141C19/79).

189. White to Harrison, supra, Note 188.

1932 that the Colombian Consul in Jamaica had threatened that an American ship leaving Jamaica to load guano on Serrana and Roncador would be seized by Colombian coast guards;[190] and that the consul had granted permission to a Colombian citizen to take guano off Serrana, the Colombian Minister to the United States agreed with the State Department that no permits to remove guano should be granted by either country until the question of sovereignty was finally settled.[191]

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190. Cournoyer, U.S. Vice-Consul at Kingston, Jamaica, to Stimson, Sec. of State, April 29, 1932 (811.0141C19/69).

191. Conversation, Dr. Lozano, Col. Min. to U.S. and James Rogers, Assn't Sec., June 21, 1932 (811.0141C19/85).

d. The Claim of Honduras.

The claim of Honduras to the islands of Roncador and Quito Sueno was not advanced until 1928, after the publication of the agreement of 1928 between Colombia and Nicaragua. In a note of December 24, 1928, to the United States Secretary of State, Honduras asserted that it had documents "proving its complete dominion" over Roncador and Quito Sueno, and enclosed a copy of a note to the Nicaraguan Minister of Foreign Affairs to the effect that the Government of Honduras was ready to defend its rights to Roncador and Quito Sueno, "making immediately its respectful but firm protest in the carrying on of a contest which directly injures the territorial integrity of Honduras."[192] A similar protest was presented to Colombia, which categorically refused to entertain the claim.[193] The United States replied by quoting the Proclamation of Secretary Fish of November 30, 1869, relating to Jennett's interest in Roncador, the President's Proclamation of June 5, 1919 (Roncador); and the Department's approval of Jennett's occupation of Quito Sueno, November 26, 1869, its inclusion

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192. Izaguirre, Honduran Chargé ad interim at Wash., to Kellogg, Sec. of State, Dec. 4, 1928 (translation, 811.0141C19/44).

193. Cafferey, U.S. Min. to Col. to Sec. of State, Oct. 2, 1929. Enclosure, (811.0141C19/54).

inclusion in the treasury list of 1871, and the Proclamation of February 25, 1919 (Quito Sueno); and concluded: "From the foregoing it will be evident that this Government has already regarded Quito Sueno Banks and Roncador Cay - since their discovery by Jennett - as being under the sovereignty and jurisdiction of the United States and it can not, therefore, admit any claim of a foreign nation to sovereignty over these islands."[194] Copies of this note were sent to the American Ministers at Nicaragua and Colombia.[195]

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194. Kellogg, Sec. of State, to Izaguirre, Honduran Chargé at Wash., Dec. 26, 1928 (811.0141 C19/46).

195. See 811.0141 C19/47, 48, 49.

V. History of Serrana

a. Geography

Serrana Bank is a large tongue-shaped bank, steep on all sides, and surrounded by an almost solid barrier-reef except on the west and southwest. There are three low islands on the bank. One, North Key (or Cay) at latitude 14° 17' N., longitude 80° 24' W., at the northwest end of the reef, is about 300 by 150 yards square. It is composed of sand, shells and driftwood, and has bushes on it about five feet high. Midway between North and Southwest Keys are the Northwest Rocks, two patches of rock and sand 1800 yards apart and two feet high. Southwest Key, the largest of all the islands on these four banks, is about 1000 by 3000 yards square and is thirty-two feet high. It is made up of sand, grass, brushwood and broken coral; it has or had one cocoanut tree on its summit; and fresh water can be obtained from wells. The only landing is on the north side, but temporary anchorage may be had one-half mile northwest of the Key. The United States light is on this Key. South Keys are four in number: Narrow Key, about 600 yards long, composed of broken coral; South and Little Key (14° 21' N., 80° 15' W.), made up of sand and grass about three feet high; and East Key, similar to Little Key. About one-half mile to the

northeast

northeast is a cluster of rocks above water. Small craft only can anchor in the lagoon in this bank.[196] The Superintendent of Lighthouses in 1920, reported that the islands were covered with bushes to a height of six feet and that there was some guano in certain places on the islands.[197]

Serrana Bank is in the center of the group under discussion, being about 60 miles north of Roncador, 60 miles east of Quito Sueno, and 75 miles south of Serranilla. It is approximately midway between Serranilla, the farthest north of the banks, and Old Providence, being about 75 miles northeast of the latter. The nearest mainland, the Nicaraguan coast, is over 200 miles west of Serrana.

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196. Douglas, op. cit. supra, Note 155, p. 55; Central American Pilot, Supra, Note 155, pp. 230-232.

197. Report of Trott, Supra, Note,120.

b. The Claim of the United States

J. W. Jennett is also the "discoverer" of guano on Serrana Keys. In a declaration of June 30, 1866, he states: that he arrived at Serrana in the schooner PETREL on June 26, 1866 and lay under Booby Key three days, "this Island having been previously discovered by me to have a deposit of guano on it in the year of 1857"; and that he took on board fresh water, firewood and about a ton of the best guano, "which does not appear to contain any Ammonia, but Phosphate of lime, and not much Carbonate".[198] In the assignment made by Jennett and John Cobb to Moro Phillips, February 15, 1868, it is alleged: that Jennett and Cobb discovered guano on Serrana; in September, 1867, they took "peaceful possession of the said island in the name of the United States of America, and occupied (and erected a building upon) the said island at the time last mentioned, and dug and brought away a cargo of guano from the said island to the port of New York".[199] Jennett's declaration of discovery of the islands in April, 1867, was filed with the State Department, February 15, 1868, and contains the usual allegations.[200]

In

198. Jennett's Declaration, June 30, 1866, 5 MS Miscl. Let. re Guano.

199. 5 MS. Miscl. Let. re Guano.

200. Enclosure, Peter Clark to Wm. Seward, Sec. State, June 26, 1868, 5 MS. Miscl. Let. re Guano.

In a declaration, dated May 8, 1868, Jennett listed eleven islands on Serrana Bank, (though there are but six) as follows:

North Keys	(2)	14° 25' N.	80° 20' W.
N.E. "	(1)	14 24	80 14
Triangle Keys	(3)	14 20	80 05
Avelor	(1)	14 18	80 08
Sand	(1)	14 16	80 15
Booby	(1)	14 14	80 30
North Rocks		14 20	80 20
Serrana		14 15	80 24

He requested that the title to all but Serrana Key, which had been sold, be conferred on him.[201] In a supplementary declaration of July 28, 1868, Jennett alleged: that he chartered the schooner MARY MANKIN in September, 1867, to take laborers to Serrana Bank; that he stayed on the islands from September 27 to the latter part of November when he left with a cargo of guano, six laborers remaining in possession and occupation of the island until his return.[202] The nature of Jennett's occupation of Serrana is further revealed in another letter of Jennett's in which he says he discovered the islands in 1857 and occupied them from 1860

to

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201. Jennett's Declaration, May 8, 1868, 5 MS. Miscl. Let. re Guano.

202. Jennett's Declaration, July 28, 1868, 5 MS. Miscl. Let. re Guano.

to 1861 until the Civil War broke out, when he abandoned them until 1867 when he fitted out a vessel and took charge of them again. He adds: "my object in putting them under the American flag is to sell them"; and that he would sell them to the Government, as they are adapted for a coal depot because of the "splendid harbor", and good fresh water and firewood, but that the Government is too "long-winded".[203] Jennett's declarations are supported by a certificate of John Cobb, Master of the MARY MANKIN, in which he says that in October, and November of 1867, 260, 270 tons of guano were removed from the islands,(204) and by the testimony of P. S. Borden, Master of the brig HENRY LAWRENCE, and of Philip Stanhope, also of the HENRY LAWRENCE.[205]

Before the United States recognized Jennett's claim to Serrana Keys, there was considerable correspondence on the subject. In July, 1868, the Secretary of State, Seward, acknowledged the receipt of Jennett's first papers relating to his discovery, and said:

"This

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203. J. W. Jennett to G. L. Walker, Nov. 3, 1868, 5 MS. Miscl. Let. re Guano.

204. John Cobb's Declaration, Mar. 16, 1868, 5 MS. Miscl. Let. re Guano.

205. Declarations of Borden, June 8, 1868, and Stanhope, June 10, 1868, 5 MS. Miscl. Let. re Guano.

> "This acknowledgment is not to be construed as a recognition of the validity of the claim..... It has been held by the Attorney General that actual occupation of the island where guano has been discovered is an express condition of the act of Congress which is not complied with by a mere symbolical possession or occupancy, as by the planting of a flag, the erection of a tablet, an inscription or other like acts. From the position of the islands described, it is quite probably that they may be claimed to be within the lawful jurisdiction of some of the governments holding the nearest mainland or adjacent islands. Mr. Jennett will be at liberty to file any further evidence in respect to the distance of the islands from the mainland and other islands actually occupied, as may be proper for the consideration of such claim in case it should be made." [206]

This led to Jennett's supplemental memorial, and his testimony that he left men on the islands.[207] Seward then asked for an analysis of the guano on the islands, and an approximate statement of the amount and value of this guano, and fixed the penalty of the bond required at $50,000.[208] Jennett complied with these requirements,[209] but still his claim was not recognized because the Minister of Nicaragua and Honduras protested against his occupation of the islands, on the ground that they were within the

jurisdiction

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206. Seward, Sec. of State, to Peter Clark, Att'y. for Jennett, July 1, 1868, 79 MS. Dom. Let. 43.

207. Supra, Note 202; Jennett to Seward, Sec. of State, July 23, 1868, 5 MS. Miscl. Let. re Guano.

208. Seward, Sec. of State, to Jennett, July 31, 1868, 79 MS. Dom. Let. 148.

209. 5 MS. Miscl. Let. re Guano.

jurisdiction of Honduras. The Secretary of State said: "No certificate can be issued to you by this Department until the merits of that claim of the Republic of Honduras are settled."[210] Jennett denied the validity of the claim of Honduras or Nicaragua, saying that no citizens of any other government had occupied the islands since 1857, and stating that he was at that moment in possession of and occupying those islands: "I have my employees on them now, and have been living on them myself seven different times since 1857."[211] Secretary Seward replied that the Nicaraguan protests - "will have such effect as the facts, which may be proved in support of it, will warrant and no more. Your right will depend upon the fact, if it shall eventually be established, that the banks and cays in question are not within the lawful jurisdiction of any foreign government. The protest of the Minister renders it proper for this government to suspend an immediate recognition of your claim but will not prejudice its future examination."[212] Finally, the State Department sent

210. Seward, Sec. of State, to Jennett, Sept. 14, 1868, 79 MS. Dom. Let. 312. The Secretary was evidently mistaken in saying that Honduras claimed Serrana. The correspondence (see infra) shows it was Nicaragua.

211. Jennett to Seward, Sec. of State, Oct. 3, 1868, 5 MS. Miscl. Let. re Guano.

212. Seward, Sec. of State, to Jennett, Oct. 8, 1868, 79 MS. Dom. Let. 394.

sent Jennett certified copies of the papers he had filed with the Department.[213] The certificate, dated December 11, 1868, and signed by Seward, stated: that the enclosed copies of papers relating to Jennett's claim are true copies; and that "this certificate is not to be construed as implying any determination of this Government against a right, asserted in behalf of the Republic of Nicaragua to extend its jurisdiction over these islands or some of them."[214] The meaning of this phrase is clarified by a reference to the opinion of the Examiner of Claims on this subject in which he advises the Secretary that: "the law does not provide for anything like a formal acknowledgment of the validity of Mr. Jennett's claim which ..... is always open to examination."[215]

The State Department subsequently confirmed this qualified approval of Jennett's interest in Serrana by refusing to entertain the Nicaraguan claim,[216] and by stating, in a letter to Mrs. Jennett, that Jennett, and his

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214. Copy of Certificate, Dec. 11, 1868, signed by Seward, Sec. of State, 5 MS. Miscl. Let. re Guano.

215. II Opinions and Reports of the Examiner of Claims, 589.

216. See Infra, Note 228.

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213. Seward to Sec. of State to Jennett, Dec. 11, 1869; 79MS. Dom. Let. 592.

his legitimate assignees, "seems to be entitled to the protection of the United States against the interference of any foreign government".[216A] Serrana was included in the list of islands in the second order of the Secretary of the Treasury to the Collectors of Customs (February 12, 1869) directing the latter to enforce the coasting trade provisions of the Guano Act. This list was first submitted to the State Department for corrections and approval.[217] The later lists also included Serrana, as an island "appertaining to the United States".[218]

No specific references to removal of guano from Serrana have been found, other than Jennett's. Although his statements are not reliable, he may really have taken guano off Serrana in 1867, and possibly at other times. Various assignments of guano of the Serrana islands were made from time to time, the earliest being dated May, 1869, and the latest January, 1895.[219] It may be that during the intervening years some guano was actually taken off the islands.

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216A. Hamilton Fish, Sec. of State, to Mrs. Henrietta Stevens, June 21, 1869, 81 MS. Dom. Let. 289; see also Wm. M. Evarts, Sec. of State, to Mr. Russell, Apr. 5, 1878, 122 MS. Dom. Let. 384.

217. McCullock, Sec'y. of Treas. to Seward, Sec'y. of State, Jan. 7, 1869, 6 Miscl. Let. G.

218. I Moore's Digest, 567.

219. See Appendix.

On the other hand, the assignments may have been entirely for speculative purposes, and not for the bona fide exploitation of the islands. At any rate, the fact that assignments were made shows that the individuals concerned did not regard the islands as abandoned.

It is clear from the testimony of disinterested observers that the islands have been frequented by fishermen. The Central American Pilot (1927) says that: "In the turtle season, March to August, the bank is visited by fishing craft from Jamaica and neighboring islands and their masts and temporary huts may be seen at this period."[220] In 1920, the superintendent of the lighthouse reported that the island was uninhabited, but that there was one fisherman's hut at the north end of the Cay.[221]

By the President's Proclamation of February 25, 1919, it was declared that, pursuant to the guano act of 1856, Serrana Bank was "now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other Government". In the same proclamation it was reserved for lighthouse purposes. In June a lighthouse

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220. Central American Pilot, Supra, Note 111, p. 230.

221. Report of Trott, Supra, Note 120.

was erected on Southwest Cay.[222] There followed the Colombian protests, described above in connection with Roncador and Quito Sueno. For some time both Colombia and the United States referred to the light on Serranilla, but as there was no light on Serranilla at that time and there never has been, it is assumed that Serrana was meant.[223] This controversy was temporarily adjusted by the exchange of notes between the United States and Colombia in April, 1928, described above.[224]

Subsequent to the building of the lighthouse, but before the Agreement of 1928, the United States manifested its control over the island in another fashion. In answer to a request from an American citizen in March, 1922, that he be permitted to remove birds' eggs from Serrana to sell them to Jamaicans,[225] the State Department quoted the Proclamation of 1919; then referred to Article 5 of the Convention of August 16, 1916, between the United States and Great Britain, for the Protection of Migratory Birds, and

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222. Supra, Note 155.

223. Supra, Note 155. Finally Serrana is referred to. Philip U.S. Min. to Col. to Sec. State, Oct. 15, 1919, (811.822/68).

224. Supra, Note 188.

225. Latham, U.S. consul at Kingston, Jamaica, to Sec. of State, Mar. 9, 1922 (811.0141/67)

to the Act of Congress of July 3, 1918, passed to give this treaty effect; noted that the United States was protecting the same species of birds as those on Serrana along the Gulf Coast; and concluded that the United States was not disposed to favor the application for permission to take off eggs.[226] The Department considered such a concession "would be an evasion of the Act of Congress of July 3, 1918".[227]

In 1932, it was said that the Colombian Consul at Kingston, Jamaica, had given someone permission to take eggs and manure off Serrana key.[228] The United States, in a conversation with the Colombian Minister, stated that the Treaty of 1928 did not contemplate any use of the island by Colombia or Colombian nationals but only the use of the surrounding water for fishing purposes.[229] A second request by an American citizen to take eggs from Serrana and Serranilla was denied by the United States in June, 1932, on the grounds that the applicant had apparently no interest in the islands under the Guano Act.[230]

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226. Carr, Ass. Sec. to Latham, U.S. Consul at Kingston, Jamaica, May 26, 1922 (811.014/71).

227. Id., Jan. 16, 1923 (811.014/85).

228. C. E. Scott to Sec. of State, May 21, 1932 (811.0141C19/74

229. Memo. and note, Mr. Hackworth, June 14, 1932, (811.0141 C19/81).

230. Mr. Hackworth, LE, to C. E. Scott, June 20, 1932.

c. The Claim of Nicaragua.

The State Department notified Nicaragua and Honduras of the American claim to discovery of guano on Serrana, and inquired whether either Government claimed jurisdiction over these islands.[231] Honduras replied that the islands were so far south that they must be in Nicaraguan territory.[232] Nicaragua claimed the islands by virtue of right of discovery, and proximity to the Nicaraguan coast. The Examiner of Claims rejected this claim because: the island was 160 miles from the nearest point in Nicaragua, and 75 miles from Old Providence; neither Nicaragua nor Spain had ever actually occupied the island; and, in fact, Nicaragua only alleged "priority of right to acquire title. This does not amount to actual or even constructive jurisdiction over the territory, and ought not to take it out of the category of unappropriated land open to the first-comer." He added that the distance from the mainland was too great to make it a part of Nicaraguan territory, especially as this small island could be no menace to Nicaraguan security, and concluded that Jennett should be given certified copies of

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231. Seward, Sec. of State, to Senor Don Ignacio Gomez, Min. of Nic. and Honduras, Feb. 27, 1868, 2 MS. Notes to Nicaraguan Legation 4.

232. See Memo. by R. L. K. (LA), Dec. 18, 1928 (811.0141C19/45)

his filed papers.[233] (This was done, see Supra, V, b)

Secretary Seward's reply to the Nicaraguan Government was evidently based on this report of the Examiner, but it contained certain additional statements:

> "It appears ....., that the reasons for the claim of jurisdiction by Nicaragua over that island, are that its name shows that it must have been discovered by Spaniards, that Nicaragua has inherited the rights which Spain acquired by that discovery, and that the vicinity of the island to the mainland of Nicaragua, also imparts or strengthens a right in the latter to jurisdiction over it.
>
> "In reply, I regret to inform you that the reasons referred to are not deemed sufficient for the exclusion or disturbance of citizens of the United States who may visit the island for the purpose of removing guano therefrom. It is not proved or even asserted by Nicaragua that the island was ever occupied by Spain, by Nicaragua, or by any other power or by their subjects or citizens.
>
> "The fact that it may be nearer to Nicaragua than to any other country or the possessions of any other country can not, it is conceded, impart to her any right of exclusive jurisdiction. The fact that it has never been inhabited by Nicaraguan citizens or taken possession of by the Government of that Republic or by any other power shows that it has been regarded derelict, and leaves it clear that the guano found thereon by citizens of the United States, may justly be taken away by them without violating any right or claim of any state, nation, individual possessor or claimant.
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> "Under the circumstances, this Government will conceive it to be its duty to protect

such

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233. II Opinions and Reports of E. Peshine Smith, Exmainer of Claims, Dec. 8, 1868, p. 586.

> such citizens, pursuant to the Act of Congress [of August 18, 1856] ..... This act, however, as you will perceive, does not contemplate the permanent occupation of any territory upon which citizens of the United States may discover guano, consequently, the Island of Serrana will not be fortified by this Government, nor will it in any way be occupied by the United States after the guano referred to shall have been removed by its discoverer." 234

Nicaragua appears to have made no reply to this note, and neither Nicaragua nor Honduras has made any other protest against the occupation of Serrana Keys by the United States. The treaty of 1928 between Nicaragua and Colombia relating to the legal status of islands in the vicinity of Serrana expressly excluded Serrana from its provisions because the sovereignty over Serrana was disputed by the United States and Colombia.[235]

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234. Seward, Sec. of State, to Ignacio Gomez, Min. of Nic. Dec. 10, 1868, 2 MS. Notes to Nicaragua 9. (italics added).

235. Supra, Note 114.

d. The Claim of Colombia.

The first protest of Colombia, in 1893, related specifically only to Roncador and Quito Sueno. Nevertheless, Serrana was then included in the islands said to form the Providence (or San Andres) Archipelago, alleged to have been discovered by Colombus.[236] Although this is the only reference to Serrana in that statement, it might be considered sufficient at least to notify the United States that Colombia considered Serrana as Colombian territory.

No record has been found of any acts of occupation, or any assumption of jurisdiction by Colombia over Serrana until 1915. In that year the concession was granted by Colombia to Mr. Uscategui, a Colombian citizen, to remove guano from certain keys, including Southwest Key of Serrana Bank.[237] As has been seen, the United States did not admit Colombia's right to make this concession.[238]

Colombia did protest against the erection of the light on Serrana in 1919. The protests, however, and the answers of the United States referred at first to Serranilla,

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236. Supra, Note 158.

237. Supra, Note 170.

238. Supra, Note 171.

no doubt meaning Serrana, because there was no light on Serranilla. The error was finally perceived, although no mention is made of it,[239] and Serrana, not Serranilla, was included in the Treaty of April 10, 1928, between the United States and Colombia.[240] Since then, Serrana has been included in the subsequent informal conversations and negotiations.

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239. Supra, Note 223.

240. Supra, Note 188.

VI The History of SERRANILLA.

a. Geography

Serranilla, at latitude 15° 50' N, longitude 79° 50' W, is a coral bank, roughly circular in shape and about 24 by 20 miles square. There are three small keys composed of sand and coral on the southeast side of the bank. East Key (or Cay) is about 600 by 100 yards in size, with bushes seven feet high. Middle Key, 500 yards across, is similarly covered with bushes. 600 yards to the west is a dry ridge of rocks. Beacon Key, latitude 15° 48' N, longitude 79° 51' W, is a half mile long, composed of sand and coral, with samphire grass rising eight feet above the sea. There is a beacon of coral stones twenty-five feet high on the western end of the key erected in 1835. Brakish water, containing much lime, may be obtained from wells on Beacon Key. There is good anchorage about a mile to the northwest.[241]

Serranilla is the farthest north, and the farthest west of the four banks. It is 75 miles north of Serrana, the nearest bank, and about 80 miles southwest of Pedro Bank, a British possession lying south of Jamaica. Old Providence is over 150 miles southwest of Serranilla. The nearest point on the mainland, Cape Gracias á Dios, is about 220 miles to the west of Serranilla, and Jamaica is roughly the same distance to the northeast.[242].

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241. Central American Pilot, supra, Note 111, pp. 227-228.
242. Ibid, Map, frontispiece.

b. The Claim of the United States

On May 24, 1869, J. W. Jennett filed a declaration of discovery of guano, December 18, 1866, on Serranilla Keys, The declaration contains the usual allegations, an estimate of the value of the amount of guano at 100,000 tons, and a request that the islands be considered as appertaining to the United States, under the Guano Act.[243] Jennett's allegations were substantiated by certificates of Henry Stevens, first mate on the PETREL in 1869 and George Nelson, second mate.[244] In a second notice of discovery, June 23, 1877, Jennett refers to his first discovery in December 18, 1866, his acts of taking possession, and his notice of discovery in 1869, and adds:

> "that I visited said Islands, Rocks or Keys in May 20, 1875, and found said Islands and Keys wholly unoccupied by any human being, that I remained in quiet peaceable possession, and found them the same, and undisturbed since my first discovery and occupation in 1866, and that said deposits had not been disturbed or interferred with during that time, or since".[245]

There was a second "discovery" of Serranilla, by Pascal Quinan. He filed a certificate with the State De-

Department

243. Jennett's Declaration, May 24, 1869, 6 MS. Miscl. Let. re Guano 1962. In an earlier statement, dated June 30, 1866, Jennett said Serranilla Island was very small and low, with some guano. - 5 MS. Miscl.Let. re Guano.

244. Certificates of Stevens, and Nelson, May 25, 1869, 6 MS. Miscl. Let. re Guano 1964, 1965.

245. Jennett's Declaration, June 23, 877, 6 MS. Miscl. Let. re. Guano 1981. Jennett made and filed with the Department, a map of Serranilla Island, which looks remarkably like all the other islands of which Jennett drew pictures. - 6 MS. Miscl. Let. re Guano 1970, 1971.

Department on October 25, 1882, which read in part as follows:

> "I did, in January A. D. 1879, discover a deposit of guano on certain keys, ... I caused these keys to be again visited in 1881 and again in July, 1882."

He described the keys; alleged that they were totally unoccupied at the time of the said discovery of guano, and that he raised the American flag over one of them and took possession of the whole in the name of the United States; that the keys contain about 40,000 tons of guano, valued at $40,000; and requested they be considered as appertaining to the United States-"upon my furnishing further satisfactory evidence that said keys are not in the possession or occupancy of any other government ..... or of any other persons not in my interest or service; and upon my occupying more fully, and shipping the guano from said islands for the benefit and behoof of the citizens of the United States".[246]

The action taken by the State Department with regard to these conflicting claims of discovery is not clear. Though Quinan filed no bond, he wrote the Secretary of State acknowledging the receipt of authenticated copies of certain papers relating to his discovery of guano deposits

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246. Pascal Quinan's Declaration, Oct. 25, 1882, enclosure in Quinan to Frelinghysen, Sec. of State, 6 MS. Miscl. Let. re Guano 2022.

on Serranilla no proclamation seems to have accompanied these papers, however.[247] Whose discovery preceded Quinan's, does not appear to have received any certificate or proclamation, such as he received in connection with the other islands. He filed no bond for Serranilla. In 1877, the State Department replied unequivocally to an inquiry regarding Serranilla as follows: "The United States lays no claim to jurisdiction over the islands in question."[247A] However, William Van Derlip, an assignee claiming under Jennett, did file a bond on September 8, 1879, and again on September 13, 1880, and the Examiner of Claims advised that the Department of State recognize his claim.[248] Although no certificate or document issued to Van Derlip has been found, some recognition was evidently accorded to him, as the State Department notified Mr. Rastus Ransom, another of Jennett's assignees, that: "the Department holds that the title to the guano deposits on these keys vested in Mr. Van Derlip", but added that

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247. Quinan to Frelinghysen, Sec. of State, Jan. 10, 1883, 6 MS. Miscl. Let re Guano, between pp. 2004-2005.

247A. F. W. Seward, Ass. Sec. to H. W. Heironmis and W. Fensley, Nov. 26, 1877, 120 MS. Dom. Let. 572.

248. O'Connor, Opinions and Reports of Examiner of Claims, Opinion of Nov. 12, 1879.

that the courts were, of course, open to other claimants.[249] Nevertheless, in view of this letter some recognition must have been accorded Van Derlip. No proclamation appears to have been issued to him, but this is explained by the fact that this practice was discontinued after about 1869.[250]

There has been no formal act, other than this recognition of Van Derlip's interest, which would constitute notification of the assumption of jurisdiction over Serranilla by the United States. As has been said, no proclamation was issued to the discoveror or his assignees. Serranilla was not included in the Treasury list of 1871, since the island was not bonded until 1879.[250A] Nor has the Government ever issued formal proclamation, such as the proclamations of 1919 regarding Roncador, Quito Sueno, and Serrana, announcing that Serranilla was under the sole and exclusive jurisdiction of

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249. Frelinghuysen, Sec. of State, to Rastus S. Ransom, Dec. 26, 1884, 153 MS. Dom. Let 511. See Also Porter, Ass. Sec. to Mr. Throndike Saunders, April 2, 1885, 154 MS. Dom. Let. 658.

250. I Moore's Digest 561-562.

250A. The lists of bonded islands, transmitted from the Treasury Department to the State Department in 1890 and 1893, Serranilla was included. Garrison, Acting Comptroller, to A. A. Adee, 2nd Ass. Sec., July 3, 1890, 6 MS. Miscl. Let. re Guano 2330, 2331, 2335.

of the United States. No light has been erected on Serranilla, nor has any use been made of the island, other than the extraction of guano by private citizens. It is, moreover, impossible to say how much or when this guano was removed, though it is probable some was taken off about 1880-1885.[251]

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251. Thorndike Saunders to Rastus Ransom, May 27, 1884, (6 MS. Miscl. Let. re Guano 2038) Quinan stated in 1884 that he had shipped guano from Serranilla, (see copy of Deed, Pascal Quinan to Philip Snowden. Oct.13, 1884. 6 MS. Miscl. Let. re Guano 2032). In 1890, Jennett states he had never worked Serranilla Islands, except to remove samples, (Deed from J. W. Jennett to Arthur Brach, Nov. 10, 1890, 6 MS. Miscl. Let. re. Guano 2043).

c. The Claim of Colombia

Colombia is the only government other than the United States that appears to have laid any claim to sovereignty over Serranilla, and that claim has never been presented through diplomatic channels to the United States. Its existence is only inferred from certain records of the State Department which indicate that Colombia regards Serranilla as a part of the Providence Archipelago, and as under Colombian jurisdiction.

Serranilla was never mentioned in the exposition of Colombia's claim in 1893. The first, and practically the only record available of any act of jurisdiction by Colombia over Serranilla is the concession to Mr. Uscategui, in 1915, to remove Guano from certain islands, including Serranilla.[252] The United States and Colombia did not correspond on this subject, and it was not until 1919, after the erection of lights on the other three banks, that Serranilla was mentioned in the diplomaitc negotiations between the two governments. Even then, as has been seen, it was by mistake, Serrana and not Serranilla being what each side had in mind. Serranilla was dropped from the

correspondence

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252. Supra, Note 170

correspondence when this mistake was discovered, though no mention was made of the error.[253] Furthermore, Serranilla was not included in the treaties of 1928 between Colombia and Nicaragua, and Colombia and the United States, and has not figured in any of the subsequent negotiations.

In spite of the paucity of evidence in support of Colombia's claim, the concession to Mr. Uscategui is alone sufficient to show it does exist. The lack of evidence in the State Department files of any other sovereign rights exercised by Colombia over Serranilla may be due to the fact that Colombia has never been called upon to produce such evidence. Nevertheless, it is clear that Colombia never has protested against the United States occupation of Serranilla, although a formal protest would almost certainly be made if an occasion should arise.

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253. Supra, Note 223.

VII Analysis of The Claims of Foreign States.

a. The Claim of Colombia to Roncador and Quito Sueno.

The Colombian claim to Roncador and Quito Sueno is based primarily upon discovery of the islands by Spain, Colombia's predecessors in title.[254] This has been discussed above, and the conclusion was reached while the islands were not discovered by Columbus; it is probable that since the discovery was made by Spanish navigators.[255] Nevertheless, this has not been proved, and unless the actual discoverer can be determined, it may be doubted that there is a sufficient foundation for a territorial claim based on discovery. In this connection, the award in the Clipperton Island case (France and Mexico) is significant:

> "According to the actual state of our knowledge, it has not been proved that this island,..... had been actually discovered by the Spanish navigators. That they might have [discovered it].....is a conjecture more or less probable, but from which one cannot draw any decisive argument." [255A]

Second, it is claimed that by virtue of the Royal Decree of 1803, the Province of New Granada obtained the control of the islands which, therefore, passed to

Colombia

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254. Supra, IV C.

255. Supra, III a.

255A. Award of Victor Emmanuel III, King of Italy, in the Clipperton Island Case, Jan. 28, 1931, between France and Mexico,- Vol. 26 A.J.I.L.390, 392-3 (April, 1932)

Colombia after the revolution, and not to any other Spanish colony.[256] The order related to "The islands of San Andres, ...and....that part of the Mosquito Coast extending from Cape Gracias á Dios inclusive as far as the River Chagrés".[257] There is nothing to show that this order related to the islands in question, except the allegation that a map of the Providence Archipelago, made pursuant to this Royal Order, included Roncador and Quito Sueno. This map has not been found, but if it does include these islands, and if it is an official map, it is some evidence that Spain did claim them, as part of the San Andres Archipelago, at that time. Still there is no evidence of any occupation, use, or other act of jurisdiction and control relating to these particular islands some 75 miles away from Old Providence. Furthermore, it is clear that the Decree did not establish Colombian sovereignty over all the territory it comprised, since the Nicaraguan-Colombian Treaty of 1928 recognizes the sovereignty of Nicaragua over the Mosquito Coast and the adjoining Keys.[258]

Both

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256. Supra, III c.

257. Supra, Note 107.

258. Supra, Note 114. 1 yr. A. A. Adee noted (Mar. 9, 1896) that Colombia only pressed this claim to the Mosquito Coast in the hope of gain in case a canal were built across Nicaragua. (Memo attached to McKinney, U.S. Min. to Col. to Olney, Sec. of State, Feb. 12, 1896, 53 MS. Colombia; No. 157.)

Both the allegations of Spanish discovery and of Colombian succession under the Royal Order of 1803, depend largely upon the theory of territorial contiguity. Old Providence, the nearest Colombian territory, is seventy-five miles from Roncador and forty from Quito Sueno. It is, moreover, a volcanic island, very fertile and suitable for cultivation and habitation,[259] while Roncador is a barren key of sand and coral, and Quito Sueno nothing but coral rocks.[260] The islands are no more part of one geological formation than are Cuba and San Domingo, or Old Providence and the Isthmus. The Mosquito Keys are about the same distance from Old Providence as Serrana and Roncador, and are admittedly Nicaraguan territory. Pedro and Serrana Banks are about equidistant from Serranilla, but the islands on Pedro Bank belong to Great Britain.[261] Whether or not certain islands are part of an archipelago is a question which cannot be determined a priori, merely by looking at their position on the map. Especially is this true when the islands in dispute are small, barren,

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259. Central Am. Pilot, supra, Note 111, pp. 234-235. San Andres is similar in character to Old Providence. Ibid pp. 239-241.

260. Supra, Note 115.

261. I 1917 Solicitors Opinions 584, Mr. Hackworth, Apr. 9, 1917.

and of a different character and not suitable to the same uses as the nearest occupied island.

Third, it is alleged that Colombian possession of Roncador and Quito Sueno has been practically uninterrupted since 1803. This assertion is substantiated in part by the Colombian Decree of 1854, prohibiting the removal of guano from the Providence Archipelago. The Decree was said to be caused by the action of the American ship ST. LAWRENCE in 1853, in removing Guano from Roncador contrary to the orders of the Prefect of San Andres.[262] Although the records in Baltimore indicate only that the ST.LAWRENCE came from the Spanish Main,[263] Colombia declares that on the basis of evidence collected from the natives in the vicinity, it had taken Guano from Roncador. There is, moreover, no record in the State Department of the Colombian Decree of 1854, and no notice from the American consuls or minister that it had been communicated to them. However, granting that the facts are as Colombia claims, the Decree does not appear to have been enforced in so far as the Guano islands are concerned; for there is no complaint of its violation by Colombia until 1890,[264] and apparently no complaint

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262. Supra, IV, c.
263. A. A. Adee, Acting Sec. to Don Rengifo, Col. Min. to U.S., Aug. 29, 1892, 7 MS. Notes to Colombia 203.;See also John W. Foster to Don Rengifo, Aug. 16, 1892,7MS. Notes to Colombia 202.
264. It was not until 1892 that Colombia made any inquiry of the United States concerning the activities of the St. Lawrence. Evidently the inquiry made at that time was for the purpose of obtaining evidence for the exposition of Colombia's claim in 1893. see Supra, Note 263.

complaint by American citizens of any Colombian interference.

The only other possessory act alleged by Colombia is the occupation of Roncador and Quito Sueno by fishermen from Old Providence and San Andres during the turtle breeding season (March to August). That the banks are now and have been for some time frequented by fishermen is clear. They have built huts and probably stayed on Roncador at intervals; but Quito Sueno Rock is evidently uninhabitable even by fishermen, and the only use they could make of that bank is to fish around and over it.[265] It is impossible to determine from the evidence now available for how many years fishermen have gone to these banks.[266] It is, moreover, difficult to believe that these fishermen were only Colombian citizens. In fact, there is evidence that at least some of them came from Jamaica and the Mosquito Keys.[267] Colombia claimed an exclusive right in 1926, when the British fishermen were arrested off Quito Sueno, but this was not admitted by Great Britain, and it is doubtful that before then there was even an attempt to make the fishing right exclusive.

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265. Central American Pilot, Supra, Note 111.

266. Jennett never mentioned them, though he was sometimes at the islands during the fishing and turtle season. However, he would not have mentioned them if he had seen them for fear of injuring his claim; so no reliance can be placed on his silence.

267. Central American Pilot, Supra, Note 111, p. 230.

Even if it be admitted Colombian citizens, from Providence and San Andres, have fished off Roncador and Quito Sueno from the early nineteenth century, still it is questionable what rights of territorial sovereignty this gives Colombia. In the Aves Island Case, involving a question of sovereignty over a barren island, similar to those under discussion, it was held that the Netherlands had acquired a right to fish off Aves Island, but that the Island belonged to Venezuela, the first Government to assert sovereignty over it. The language of the award in a case so similar to the instant case is significant:

> "Considering that even though the fact seems to be proven that the inhabitants of ....., a possession of The Netherlands, go to fish for turtles and to gather eggs on the Island of Aves, this fact cannot serve as a basis for the right of sovereignty, because it only indicates a temporary and precarious occupation of the Island, fishing not being in this case an exclusive right, but the consequences of the abandonment of it by the inhabitants of the nearby regions, or by its legitimate owner.....considering finally that the Government of the Netherlands has done nothing else except to utilize the fishing of the said island through its colonists, while the Government of Venezuela was the first to have armed forces there, and to exercise acts of sovereignty, thus confirming the dominion which it acquired by a general title derived from Spain.....the ownership of the island in question belongs to the Republic of Venezuela, the indemnization for the fishing which the Dutch subjects ceased to take advantage of remains as a charge upon the latter (Venezuela), if in fact it deprives them of the utilization thereof....." [268]

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268. Supra, Note 4 (Italics added).

It is also asserted that Colombia's silence from 1871, when Roncador and Quito Sueno were included by The Secretary of the Treasury in the list of islands "appertaining to the United States", to 1890, was because Colombia was ignorant of this list, no formal notice of an American claim to the islands having been sent out, and that in any event, prescription creates no title in international law.[269] After the Berlin Declaration of 1885 requiring formal notice of claims to territory in Africa, notice was sometimes given of claims to other territory, but it does not appear to have been recognized as a rule of international law.[270] In fact, the Berlin Declaration, which relates only to Africa, and binds only signatories and not the United States, shows that it was necessary to make a special rule to that effect. It is not notice, but notoriety that is important. In the Clipperton Island Case it was said:

> "The regularity of the French occupation has..... been questioned because other Powers were not notified of it. But it must be observed that the precise obligation to make such notification is contained in Art. 34 of the Act of Berlin, ...which.....is not applicable to the present case. There is good reason to think that the notoriety given to the act, [of taking possession of Clipperton in the name of France] by whatever means, sufficed at the time....."[270A]

Whether

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269. Supra, IV c.

270. I Moore's Digest 267-268; Hyde, Op. cit. Supra, Note 11 pp. 171-173; Oppenheim, op. cit. Supra, Note 8, p. 386.

270A. Clipperton Island Case, supra, Note 265A.

Whether prescription does or does not create a good title to territory under international law, Colombia's silence cannot but prejudice the Colombian claim because it indicates that either Colombia did not know before 1890 of the action of American citizens on the islands, or that Colombia knew but did not care. Moreover, as has been shown above, there is considerable authority for the proposition that prescription (uninterrupted, undisputed possession) may create a good title to territory in international law. Whether twenty years is long enough, however, to create such rights, is questionable. [271]

The fact that the United States did not reply to the Colombian protest of 1893, cannot be regarded as an admission of the strength of Colombia's position, since the reason for this silence was the fear of disturbing the pending arbitration of the boundary between Colombia and Costa Rica.[272]

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271. Supra, II a.

272. Memo. by A. A. Adee, Sept. 11, 1894, attached to Rengifo's note of Jan. 18, 1893. 8 MS. Colombia, Notes. There is, however, another memo attached to the same document, by a Mr. Richardson, giving it as his opinion that Colombia's claim was established and the islands should not be considered as appertaining to the United States. This opinion was not adopted by the Department, as is clear from Mr. Adee's memo, Supra.

At this period, the United States Government appears confused about the exact nature of Roncador and Quito Sueno and of the claims to them.[273] This is evident from the request that Colombia build a light on Roncador. The subsequent note declaring that this request had nothing to do with the question of sovereignty de jure, but only de facto, does not help the situation appreciably.[274] However, this admission of Colombian sovereignty, if it is an admission, relates only to Roncador and has nothing to do with Quito Sueno. Moreover, its effect as an admission is counteracted by the Proclamation of 1919, asserting that the United States had already acquired sovereignty over Roncador by virtue of occupation under the Guano Act.

Colombia also alleged that Jennett was not even the discoverer of guano on the islands, since certain early maps noted its existence on them.[275] The only indication of that nature on the maps examined for this report is that "Guana Reef" is sometimes given as an alias for Quito Sueno.[276]

Guano

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273. See Bayard, Sec. of State, to Don Ricardo Becerra, Col. Min. to U.S., Nov. 14, 1885, 7 MS. Notes to Col. 54, 60. The interest of the United States in a possible Panama on Nicaragua Canal probably influenced both Colombia's and the United States' attitude regarding anything in the western Caribbean Sea during these years.

274. Supra, Note 169.

275. Supra, IV C.

276. Supra, Notes 87, 88, 89.

Guano is the generic term for certain sea birds,[277] and the name "Guana Reef" may have been derived from Guan rather than Guano, especially as it is applied to Quito Sueno, on which there could never have been much guano.[278] In the second place, the fact that the existence of guano was known before Jennett's "discovery" makes no more difference than does the fact that the existence of the islands themselves was known. The word "discover" in the act means discover for the purposes of the act, and one is only a discoverer within the meaning of the act if one has complied with all the conditions therein prescribed. This is clear from the opinion of the Attorney General relating to a claim to Johnson's Island, in which it is said that once a Guano Island has been abandoned under the Act, it is again open to "discovery".[279]

The second presentation of the Colombian claim to Roncador and Quito Sueno in 1919 alleges no new grounds, except the so-called admission of the United States in 1894

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277. Encyclopedia Britannica; Guan.

278. Supra, IVa.

279. Op. cit. Supra, Note 45.

1894, (when Colombia was asked to build a light on Roncador) which has already been discussed.[280] Colombia might claim, however, that previous to the erection of the lights in 1919, the United States had abandoned the islands, after the removal of Guano had virtually ceased in about 1900, and that they had been used and occupied by Colombian fishermen through whom Colombia had acquired title. This contention would presuppose that the United States had acquired sovereignty by virtue of Jennett's discovery and use of the islands, and it should be noted that once sovereignty has been acquired, it will not be readily presumed abandoned. The action by the State Department in 1894, and the last section of the Guano Act,[281] which might point to abandonment of the islands, are counteracted by the fact that as late as 1911 Guano may have been removed from Roncador, and by the subsequent behavior of the United States in erecting lights on both islands without requesting permission from any other Government. The action or non-action of its citizens could not prejudice the rights of the United States Government once sovereignty had been acquired. Moreover,

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280. Supra, Note 274.

281. Supra, Note 16.

it is only a matter of twenty-five years at the most that the islands can be said to have been unused by either United States citizens or the United States Government. This can scarcely be called sufficient time to create a presumption of abandonment, but even if it did, in conjunction with the United States request of 1894 which might indicate an intent to abandon, the presumption is rebutted by the Proclamation of 1919 and the erection of lights. With regard to abandonment, the United States is in a stronger position than was France in the Clipperton Island Case, yet it was held there that:

> "There is no reason to suppose that France has.... lost her right by derelicto, since she never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected.[281A]

281A. Clipperton Island Case, Supra, Note 265A.

D. The Claims of Colombia to Serrana and Serranilla

All the arguments given above to refute the Colombian claim to Roncador and Quito Sueno apply with even greater force to the claims to Serrana and Serranilla. With the exception of a passing reference to Serrana in 1893, these two islands were mentioned for the first time in the second presentation of Colombia's claim to Roncador and Quito Sueno, in 1919. As has been pointed out, Colombia then refers to Serranilla, undoubtedly meaning Serrana on which the light was built. Nevertheless, in view of the Colombian concession in 1915 to Mr. Uscategui, it may be assumed that Colombia intends to claim Serranilla also.[282]

Because of failure to protest the United States occupation and use of Serrana until 1919, about fifty years after the American occupation of the island had begun, Colombia's claim to this island is far weaker than the claim to Roncador and Quito Sueno. It is weaker yet with regard to Serranilla, since it was not included in the protests of 1919, except by mistake, and was not mentioned in the consequent treaty of 1928. Serranilla, moreover, is further away than any of the other islands, being 75 miles north of Serrana, and as far again from Old Providence.

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282. Supra, Vd, VIc.

c. The Claim of Honduras to Roncador and Quito Suena.

The claim of Honduras to Roncador and Quito Sueno may be quickly dismissed. In the first place, although it is stated that Honduras has documents proving its dominion, no documents have ever been submitted. In the second place, the claim was not advanced until 1928, approximately sixty years after the United States had authorized Jennett's use of the islands by the Proclamation of Secretary Fish of November 30, 1869.[283] Either Honduras was unaware of the American occupation of the islands during those years, in which case there must have been very little connection between Honduras and the islands, or Honduras did not think of claiming the islands until 1928. It is significant that in 1869, when the United States notified Honduras and Nicaragua of Jennett's claim to Serrana, that Honduras replied the island was so far south it probably belonged to Nicaragua, not Honduras.[284] Quito Sueno is in about the same latitude as Serrana, and Roncador several degrees farther south.

It is plain that a claim advanced so long after the territory in question had been occupied and used by the United States

283. Supra, IV d.

284. Memo (LA), Mar. 23, 1929 (811.0141 C19/52)

United States could not be regarded as worthy of serious consideration. Moreover, it was definitely rejected by the United States in 1928,[285] and has not been presented again.

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285. Supra, Note 194.

d. The Claim of Nicaragua to Serrana.

The Nicaraguan claim to Serrana, advanced in 1868, may be regarded as obsolete, since it has never again been presented to the Department. In his reply to Nicaragua, Secretary Seward rejected the claim as based upon insufficient grounds, but he did not conclusively affirm United States sovereignty over Serrana. He declared: that the United States will protect its citizens in the execution of the Act of 1856, but that the Act does not contemplate permanent occupation of the island, and that consequently Serrana will not be fortified by the United States, nor occupied after the Guano is removed.[286] This interpretation of the Guano Act has been superceded by others, typified by the Jones Case, [287] and by the Presidential Proclamations of 1919.[288] The erection of a light on Serrana, pursuant to the Proclamation, occasioned no protest from Nicaragua. Moreover, from the Treaty of 1926 between Nicaragua and Colombia it may be inferred that Nicaragua has abandoned whatever claim it had to Serrana, since it is only declared that the sovereignty over that island is in dispute between the United States and Colombia.

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286. Supra, Note 284.

287. Supra, Note 47.

288. Supra, Note 155.

VIII. Summary of the Position of The United States

a. Claim of the United States to Roncador.

The United States' claim to sovereignty over Roncador is based on the following grounds: the territory was abandoned and derelict at the time it was "discovered" by Jennett in 1866; the United States acquired sovereignty because of the actual occupation and use of the island by Jennett and his assignees, for purposes of extracting guano, under the Guano Act; the United States recognized his or his assignees' exclusive privileges; and finally, a light was erected on Roncador in 1919 by the United States, under claim of right.[289]

As Colombia apparently made no attempt to use Roncador or to assert any exclusive rights over the island from the time of its discovery in the 16th Century until the middle of the 19th Century, it is fair inference that if any kind of sovereignty over the island had ever accrued to Spain, by virtue of a discovery which is not proved, it had not been perfected by any subsequent acts, and that consequently the island was derelict and abandoned, open to use by the first comer.[290] Colombia's only evidence of any sovereigns acts from the 16th to the middle of the 19th Centuries are the

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289. Supra, IV b.

290. Supra, II a.

the Royal Order of 1803, followed by an exploring expedition, and the Decree of 1854, and there is little to show either that these decrees were made effective, or that they related to Roncador. The value of that evidence has already been discussed, [291] and it is only necessary to add that, regardless of who discovered it, Roncador was abandoned territory in 1866.

It is clear that mere symbolic acts of possession were not considered sufficient to give the discoverer, or the United States, any rights under the Guano Act.[292] It is also clear that the possession of Roncador was actual and not merely symbolic. Whether or not Jennett's allegations that he left men on the island in 1869 are true, it is certain he did go to the island several times between about 1880 and 1893, and that he and other American citizens removed guano from Roncador, possibly as late as 1911.[293] Furthermore, the erection of the light on Roncador in 1919 is a possessory act involving occupation of the island.[294]

The United States manifested its intention to assume complete territorial sovereignty over Roncador a number of times

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291. Supra VII a. See also Clipperton Island Case, Supra, 260A

292. Supra, II b 2, see 9 Op A. Hyben, Supra, Notes 32, 35; see also Henry Triscot, Acting Sec., to S. K. Zook, July 28, 1860, 52 MS. Dom. Let. 484.

293. Supra, IV b.

294. Ibid.

times. First, the proclamation of the Secretary of State, of November 30, 1869, though somewhat ambiguous in its wording, has been held to be an indication of United States sovereignty.[295] Second, the inclusion of Roncador in the list of islands "appertaining to the United States" of 1871, has also been held evidence of this intention, and of the fact of sovereignty itself.[296] Third, a Federal Court has actually enforced the coasting trade provisions of the Guano Act with regard to Roncador.[297] It can scarcely be doubted that these acts of authority, done under the Guano Act, are sovereign acts. That they were regarded as such by other countries is clear from the protests that were made from time to time.[298] That the United States not only assumed jurisdiction, but intended to do so, is clear from the wording of the proclamation of 1919: "Whereas, pursuant to the foregoing Act of Congress, [Guano Act of 1856] Roncador Cay in the western part of the Caribbean Sea is now under the sole and exclusive jurisdiction of the United States and out of the

jurisdiction

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295. Jones v U.S. Supra, Note 47; See II b2.

296. Duncan v Navano Phosphate Co., Supra, Note 51; See II b 2.

297. Supra, Note 69.

298. See II b 2.

jurisdiction of any other government."[299] This proclamation negatives the Colombian contention that the United States recognized Colombian sovereignty over Roncador in 1894, when the United States requested Colombia to erect a light on the Key.[300] It also rebuts any possible presumption of abandonment which might have arisen after the guano had ceased to be removed from Roncador. In this connection it should be noted that the island has never been stripped of its guano, and the last section of the act, preserving the privilege of abandoning the island, applies "after the guano shall have been removed....."[301]

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299. Supra, Note 155.

300. Supra, IV c.

301. Supra, Note 16.

b. The Claim of the United States to Quito Sueno.

The position of the United States with regard to Quito Sueno differs from its position in regard to Roncador, in that Quito Sueno Island is nothing but a small, low rock, which could not be occupied or even used by human beings at all, in all probability.[302] Neither the United States, nor the Colombian Government appeared to be aware of this, and officials of both Governments have repeatedly affirmed it has been occupied, and have referred to it as a sizable island, containing guano.[303]

Because of its geographic nature, and because of the facts which have been stated in connection with Roncador, it is almost certain that Quito Sueno rock was entirely derelict at the time of Jennett's discovery. Jennett's statements as to his occupation of Quito Sueno must be false, however. It is probable that the only occupation of any sort of Quito Sueno is the erection of the light, by the United States in 1919,[304] unless fishing off and over the bank by Colombian and other fishermen may be called occupation.

The United States has asserted sovereignty over Quito Sueno in much the same manner as it has over Roncador,

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302. Supra, IV a.

303. Supra, IV b, c.

304. Supra, Note 155.

by proclamation by the Secretary of State, by listing it as an island "appertaining to the United States" in 1871, and by the President's proclamation of 1919.[305] Whatever the merits of the United States' claim to Quito Sueno before the erection of the light, it is plain that no other country had any better claim,[306] and that by that act, jurisdiction was asserted by the United States, and occupation, as effective as possible under the circumstances, was established.

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305. Supra, IV b.

306. See Supra, VII a.

c. The Claim of the United States to Serrana.

The claim of the United States to Serrana rests upon grounds similar to those on which its rights to Roncador and Quito Sueno are founded, with some slight variations. In the case of Serrana, there is but little evidence of any actual removal of guano after about 1870. The removal of guano in the decade preceding that year, and the erection of the light in 1919, are probably the only uses made of the islands by the United States or its citizens.[307]

With regard to the evidence of an intention to assume sovereignty, there is also some difference between this case and that of Roncador and Quito Sueno. A certificate was issued to Jennett, relating to Serrana, but it expressly refuted any implication which might be drawn from it that the United States denied the Nicaraguan claim to the island.[308] Subsequently, it was stated that the Nicaraguan claim rested on insufficient grounds, and that United States citizens extracting guano would be protected, but that Serrana would not be fortified or permanently occupied by the United States after the guano was removed.[309]

There

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307. Supra, V b.

308. Supra, Notes 214, 215.

309. Supra, Note 234.

There is still guano on the islands, however.[310] Furthermore, by the proclamation of 1919, the United States evinced its belief that complete sovereignty over the island had been already acquired under the Guano Act.[311] The erection of a light, and the refusal of the Government in 1932 to grant a permit to an American citizen to remove eggs from Serrana, because this would be contrary to a treaty between the United States and Great Britain, were further acts of sovereign control and jurisdiction exercised by the United States over Serrana.[312]

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310. Supra, Note 197.

311. Supra, Note 155.

312. See Supra, V b.

d. The Claim of the United States to Serranilla.

The sovereignty of the United States over Serranilla rests upon grounds different from those discussed in connection with the other islands. In the first place, as has been pointed out, Colombia's claim to Serranilla is much weaker than its claim to the others, and no other Government has ever in any way contested the ownership of Serranilla by the United States.[313] On the other hand, the United States has not exercised such positive acts of jurisdiction over Serranilla as it has over any of the other three.

There has been little, if any, actual occupation or use of Serranilla by the United States or its citizens. From the declarations of Jennett and Quinan, it appears that the islands were visited a few times between 1866 and 1882, but that neither of these men ever actually removed guano from them during that time.[314] Furthermore, no light has been erected on Serranilla, and no other possessory action taken by the United States.

The only expressions of any intention to assume sovereignty over Serranilla are found in letters to American citizens, stating that Serranilla "appertains" to the United States,

313. See Supra, VII b.

314. Supra, VI b.

United States, and in the fact that the interest of Van Derlip, an assignee of the discoverer, in the islands was recognized,[315] The practice of issuing proclamations signed by the Secretary of State, was discontinued after about 1869,[316] and it is probable none was issued for Serranilla, to Van Derlip or anyone else. The islands were not included in the Treasury letter of 1871, because they were not bonded until 1879.[317] The mere filing of assignments with the State Department is no evidence that the island described therein is to be regarded as appertaining to the United States.[317A]

It might be said, therefore, that there is insufficient evidence of any occupation of Serranilla islands by the United States, and no evidence of an intention on the part of the United States to assume territorial sovereignty over Serranilla. On the other hand, there is even less evidence of any such occupation or expression of such intention on the part of any other Government. In the absence of any claim superior to that of the United States, and in view of the fact that there was some activity on or in relation to Serranilla by the United States, the claim of the latter would appear to be valid.

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315. Supra, VI b.

316. I Moore's Digest 561-562.

317. Supra, Note ~~245~~ 250A.

317A. Memo, (E.H.H., in So.) Oct. 27, 1911, 5 MS Miscl. Let. re Guano.

IX CONCLUSIONS

A. Sovereignty

1. The United States has acquired territorial sovereignty over the islands and rocks on Roncador, Quito Sueno, and Serrana Banks, because of the occupation, control and use of those islands by the United States under the Guano Act of 1856, in accordance with international law. The proclamations of 1919, and erection of lights on Roncador, Quito Sueno, and Serrana, supports this position, and negatives any presumption that the United States did not intend to assume full sovereignty over these islands, or had abandoned them after the guano had ceased to be removed.

The grounds upon which the claims of Nicaragua to Serrana, of Honduras to Roncador and Quito Sueno, and of Colombia to Quito Sueno and Serrana, are based, are insufficient to defeat the claims of the United States, or to establish territorial sovereignty under international law. The claim of Colombia to Roncador, however, is strengthened by the fact that in 1894 the United States requested Colombia to erect a light on that island.[318] In spite of both prior and subsequent acts and statements showing that the United States did claim sovereignty over Roncador, an arbitral

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318A. Supra, IV c.

arbitral court might agree with Colombia that this request was in effect an admission of Colombian sovereignty over the island by the United States, and an abandonment of the United States claim.

2. The United States has the right to acquire territorial sovereignty over the three islands on Serranilla Bank. According to the evidence available, no other country has any lawful interest in those islands. They have been occupied by the United States under the Guano Act, but there has been no formal, unequivocal, and public manifestation of an intention on the part of the United States to assume sovereignty over them. Although formal notice of a claim of sovereignty is said to be unnecessary under international law, in order to perfect the United States claim to Serranilla, it would be advisable to issue a proclamation, as was done in the case of Nauassa, Roncador, Quito Sueno, and Serrana,[319] so as to rebut any presumption which might arise under the last section of the Guano Act[320] that the United States intended to use the islands temporarily, for guano purposes only, and had now abandoned them entirely.

3. In

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319. Phillips, Ass. Sec. to Redfield, Sec. of Com., Jan. 29, 1919. (811.822/32); Memo (So.), Proposed Establishment of Aids to Navigation on The Serrana and Quito Sueno Banks, Old Providence Island, and Courtown Cays.

320. Supra, Note 16.

3. In view of the award in the Aves Islands Case (The Netherlands and Venezuela)[321] and of the similarity of the circumstances of that case to those under discussion, it is possible that, if the dispute over the islands in question were arbitrated between Colombia and the United States, Colombia might be found to have acquired a right to fish in the waters off the banks, and to use the islands for fishing purposes, by reason of long, undisputed user, even though the United States were said to have sovereignty. The available evidence as to the length of such use, whether it applies to all or only some of the banks, and its exclusive nature, is not sufficient to justify any definite conclusion on this point.

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321. Supra, Note 4.

B. Utility and Value.

1. Since the only objects above water on Quito Sueno Bank are the light and a small low rock, and since this rock probably contains no guano and could not be used at all,[322] it seems foolish to quarrel over the "sovereignty" of this bank. The British contention that it is open water,[323] at least so far as fishing is concerned, appears to be reasonable under the circumstances, and no reason is perceived why Colombia or any other country should object to the maintenance of the light by the United States, as this benefits all navigation in the vicinity, unless it is feared that the rock could be fortified, as was Heligoland during the World War.

2. Roncador, Serrana, and Serranilla banks do contain actual islands. There are no good harbors; fresh water exists only on South West Key of Serrana; and as the islands are all of coral formation, there are probably no minerals of any value on them. They are so small, low, and barren it would be difficult for men to live on them any length of time. On the other hand, there is some guano on these islands, although its commercial value has probably been greatly exaggerated.[324] There are also turtles, birds eggs, and fish in

322. Supra IV a.

323. Supra, Note 185.

324. Supra, II b. 1.

in the surrounding waters, all of which commodities have considerable market value. The Keys on Roncador and Serrana have been recommended for some sort of military or naval base,[325] and it is possible that the islands might be of value to the United States in case of war. They might also be of use for a weather station.

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325. Conversation, Major Greely, War Plans Division, and a member of LA, April 9, 1930 (811.0141 C19/59).

C. Duties of Sovereignty

1. The Treaty of April 16, 1916 between the United States and Great Britain, For the Protection of Migratory Birds, and the Act of Congress of July 3, 1918, making the treaty effective, by declaring the capture, transportation, etc., of certain birds, their eggs or nests, a misdemeanor,[326] have been held applicable to the birds (boobies or terns) on Serrana. The same species are no doubt found on the other three banks. The United States protects these birds on islands in the Gulf of Mexico, and should also protect them on its islands in the Caribbean. This would probably be expensive, especially as the inhabitants of neighboring territories are accustomed to taking birds eggs from the islands for sale in Jamaica, but, on the other hand, it would save the birds.[327]

2. The Guano Act has provided many opportunities for speculation and fraud. The bonds required under the Act, had to be filed with the State Department, but the filing of assignments was not compulsory and many were never recorded at all. Consequently there have been successive assignments of one island by one assignor, and assignments by

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326. III Malloy, Treaties 2645; Supra, Note 226

327. Ritchie to Sec. of State, (?) 1930 (811.0141 C19/60) Thurston, Acting Chief LA., to Ritchie, Aug. 13, 1930 (811.0141 C19/63). ~~Reporting~~ "Robbery" of eggs by ships from Panama, Colombia, and Cayman Islands.

by all his various assignees in apparent ignorance of conflicting claims, and profits have been reaped at the expense of the public and innocent parties.[328] Although it is often impossible to tell who is the proper party in interest, and, although this is for the courts to determine, the State Department has to make some preliminary and tentative judgments in order to determine who should file the bonds under the Act, and who, if any one, is entitled to the protection guaranteed by the Act. The same inefficient, inequitable system which has heretofore obtained under the Guano Act, should not be permitted to continue.

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328. See Appendix, infra.

D. Recommendations

1. The Guano Act should be repealed, since the demand for guano has largely disappeared, and since the provisions of the Act have created opportunities for fraud and dishonest speculation with which the State Department has been wholly unable to cope. It has been repeatedly said that the interest of the discoverer and his assignees was but a license subject to the will of Congress.[329] If, however, any rights so acquired may be said to have vested so that pecuniary loss would be occasioned to assignees by the repeal of the Act, there should be provisions for indemnification by the Government.[330] In most instances the loss would probably be on paper only. There should also be a provision saving any rights of territorial sovereignty which the United States may have acquired by virtue of occupation under the Guano Act, so that the repeal of the Act could not be construed as a denial of these rights, but only as a revocation of the licenses granted individuals under the Act.

2. If any further use of Serranilla Islands is contemplated, a proclamation, similar to those issued in the case of Nauassa, Roncador, Quito Sueno and Serrana, should be

329. Supra, II b 2; See Notes 32, 35.

330. See 3 op. A.H. Gen. 216, Supra, Note 58.

be issued by the United States. This procedure would probably occasion new protests and hitherto unheard of claims, however. The same result could be accomplished by obtaining Colombia's recognition of United States sovereignty over Serranilla. This would publish the fact that the United States intended to claim Serranilla islands and had not abandoned them.

3. The legal status of these islands must be settled, for new problems regarding them continue to arise which cannot be solved until the sovereignty of the islands is determined. These are not only questions of which, if any, American citizens may exploit the resources of the islands, but there are other important questions of jurisdiction, for it is said that the islands may be used as a base by narcotic smugglers, acting under cover of pretended Guano expeditions.[331]

Colombia is at present the only foreign government that appears to be seriously contesting the claims of the United States, and the dispute between these two Governments should be resolved as soon as possible, and in favor of the United States. If Colombian recognition of United States sovereignty over the islands and rocks on these four banks cannot be obtained by persuasion, resort must be had either to bargaining, or to arbitration.

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331. Information obtained from Mr. Fuller (Far East) July 28, 1932. (Mr. Fuller says McCarthy, apparently connected with the Caribbean Guano Co., is suspected of dealing in narcotics.)

Appendix

I. Assignments of Guano Deposits.

a. Assignments of Deposits on Roncador and Quito Sueno.[332]

1. Record title.

(1). J. W. Jennett to Henrietta Stevens, May 5, 1870, all right title and interest in deposits on Roncador and Quito Sueno (also Pedro Keys and Petrel Island).

(2). Henrietta Jennett (née Stevens) to the Petrel Guano Company, January 10, 1881 (conveyed same interest as above).

(3). Henrietta Jennett (née Stevens) to J. W. Jennett, June 15, 1880, the right to work Roncador for ten years. Lease approved by the trustees of the Petrel Guano Co. (Stewart and Newell) March 15, 1883.

(4). J. W. Jennett to Samuel Sloan and Samuel Schwenk and Elucen Richie, October 22, 1883, (three-quarters interest in his lease from Henrietta Jennett).

(5). The Petrel Guano Co. (represented by Samuel Schwenk) to the Caribbean Guano Co. (represented by George Crater), October 18, 1911, all right title and interest in and to guano on Roncador and Quito Sueño (also Pedro Keys, Petrel Island and Boxo Nueva).

2. Other

332. All assignments, unless otherwise noted, are filed in 5 MS Miscl. Let. re Guano.

2. Other Assignments and Claims.

(1). Henry Dewey, declaration of his intention to take guano off Roncador, under a claim of right from an alleged contract with J. W. Jennett, November 9, 1881.

(2). J. W. Jennett to William C. Jones and Cleveland W. Goff, February 10, 1891, (all guano deposits on Roncador).

William C. Jones and Cleveland W. Goff to The Columbia Guano Phosphate Co., March 25, 1891, all guano deposits on Roncador.

(3). J. W. Jennett to J. H. Lancaster, December 11, 1890, guano on Quito Sueño.[333]

J. H. Lancaster to Charles Wellborn, April 20, 1899, guano on Roncador.[334]

(These two assignments were not filed with State Department at the time they were made, but copies were sent to the Department January 31, 1928.)

3. Conclusions.

J. W. Jennett is the recognized discoverer of guano on Roncador and Quito Sueño under the Guano Act of 1856. According to the records filed with the State Departmemt, the Caribbean Guano Co. holds the record title as the assignee of the Petrel Guano Co., which had title from Henrietta Jennett, J. W. Jennett's first assignee

333. Kellogg, Sec. of State, to Senator Edge, Jan. 31, 1928, (811.0141 C19/19, 25,26,28).
334. Ibid.

b. Assignments of Deposits on Serrana.[335]

1. Record Title (?)

(1). James W. Jennett and John Cobb to Moro Phillips, February 15, 1868 (all rights to guano on Serrana Island).

2. Other Assignments and Claims.

(1). (a) James W. Jennett to the Mediterranean and Oriental Steam Navigation Company, May 18, 1869 (guano on Serrana Keys).[335] This deed is alleged to have been cancelled by mutual consent.[336]

(b) James C. Jennett, for the Mediteranean and Oriental Steam Navigation Company, to Hyron Kalt, August 4, 1870 (guano on Serrana Cays). Reference is made to the deed of May 18, 1869, supra 2 (a)

(c) Hyron Kalt to Edgar Hearle, April 16, 1894 (one-tenth interest in Serrana).

(d) Hyron Kalt to Philip Job, April 16, 1894 (three-tenths interest in Serrana).

(e) Hyron Kalt to Philip Job, May 28, 1894 (all rights, so far as Kalt's interest is concerned, to take guano from Serrana).

(f) Hyron

335. All assignments of Serrana, unless otherwise noted, are filed in 5 MS. Miscl. Let. re Guano.

336. Willard, Jennett's Att'y., to Sec. of State, June 12, 1869, Ibid.

(f) Hyron Kalt to Annie B. Dill, January 23, 1895 (six-tenths, all Kalt's interest, in Serrana Cays).

(2). (a) J. W. Jennett to Henrietta Stevens, June 4, 1869 (guano on Serrana).

(b) J. W. Jennett and his wife, Mary A. Jennett, of Baltimore, Maryland, to Benjamin Rhodes and John Russell, May 17, 1876 (10 Keys on Serrana). In this deed the name Jennett is spelled Jannett, though the signature is Jennett, and it is to be noted that J. W. Jennett's wife was Henrietta, and not Mary, and that both were from New York City and not Baltimore!

(c) Benjamin Rhodes to John Russell, March 5, 1878 (one-half interest in the 10 Keys on Serrana Bank).

(d) Henrietta Stevens to John B. Russell, April 3, 1878 (guano on Serrana).

(3). (a) Henrietta Jennett (née Stevens) to Moses D. Van Pelt, March 20, 1891 (guano on Serrana Keys).

(b) Moses D. Van Pelt to Henrietta Jennett, June 25, 1881 (same interest as above).

(c) Henrietta Stevens to Edward L. and Minnie H. Stevens (her children) December 30, 1882 (all her interest in Serrana).

(4). (a) J. W. Jennett to Arthur Brash, March 26, 1891 (guano on Serrana).[337]

(5). (a) Henry Dewey notified the State Department that he had title to Serrana Cays, and that he intended to work the guano on it, November 7, 1881.

3. Conclusions

From the records in the State Department it is impossible to tell who has the record title to guano on Serrana Keys. Both J. W. Jennett and his wife Henrietta made assignments when they had no title, according to the Department's records. The conveyance to Phillips is of Serrana Island (probably South West Key) only, and is prior to all others in point of time, but Phillips apparently made no subsequent assignments and may have reconveyed to Jennett. If he did so, Hyron Kalt's assignees would appear to have record title to all the lands provided that Jennett's deed of May 18, 1869 to the Mediteranean and Oriental Steam Navigation Company was not cancelled, as he declared it was. If this was cancelled, then the conveyance from J. W. Jennett to Henrietta of June 4, 1869 is next in point of time and the title is in John Russell, unless he reconveyed it to Henrietta (which is possible, because Henrietta appears to have been generally honest) in which case the record title is in her children.

337. See Arthur Brash, to Dept. of State, June 7, 1891, 5MS. Miscl. Let. re Guano. Brash declares that he, and not Mrs. Jennett, has the title to Serrano. See also Mrs. Jennett to State Dept. June 6, 1891. Ibid, cancelling her deed to J. W. Goff, in favor of Jennett's deed to

337. (Cont.) Brash. There is no record of Mrs. Jennett's deed to Goff, only one for Roncador and Quito Sueno from J. W. Jennett to Goff, supra.

C. Assignments of Deposits on Serranilla[338]

1. Assignments under Jennett's claim.

(a) Record title

(1). J. W. Jennett to Thomas A. Mitchell, May 10, 1869 (guano on three Serranilla keys).[339]

(2). Thomas A. Mitchell to John G. Wilson, trustee, November 22, 1876, (same interest as above).[340]

(3). John G. Wilson, trustee, to the Caribbean Guano Co., November 22, 1876 (same interest).[341]

(4). Caribbean Guano Co. to John G. Wilson, December 1, 1876 (deed of trust).[342]

(5). Caribbean Guano Co. to William L. Van Derlip, August 21, 1879.

(6). Thomas A. Mitchell to William L. Van Derlip, September 20, 1879 (release indenture, Serranilla Keys).[343]

(b.) Other

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338. All assignments of Serranilla, unless otherwise noted, in 6 MS. Miscl. Let. re Guano.

339. In a letter to the Department, Jennett declares Mitchell acted without authority, and that he, Jennett, never gave or sold Mitchell anything. 5 MS. Miscl. Let. re. Guano.

340. Filed with Morant Keys; Memo, Oct. 3, 1919 (811.0141Se6/7)
341. Ibid.
342. Ibid.
343. The Department has no record of an alleged deed from Sarah A. Van Derlip to James Chase, Mar. 11, 1904, P.C. Knox, Sec. of State, to Rep. E. W. Roberts, Aug. 15, 1912 (811.0141 Se 6)

(b) Other Assignments and Claims

(1). J. W. Jennett to the Aves Guano Co., May 9, 1880 (guano on three Serranilla Keys).

(2). J. W. Jennett to Arthur Brash, November 10, 1890 (exclusive rights on three Serranilla islands).

Arthur Brash to John Sully, August 25, 1891 (all the grantor's interest in Serranilla Keys).

(I) Guano on East Key.

John Sully to E. Young Butler, October 7, 1893.

E. Young Butler to J. H. McGrady and Henry Pearce, as trustees, April 5, 1894.

E. Young Butler to the South Sea Guano Co., February 16, 1898.

South Sea Guano Co., by W. Stewart, Receiver, to Frank Buxton, November 2, 1901.

Frank Buxton to Charles Chase, as trustee for the National Guano Co. (Chase, Mack, Stewart, Longer, Robinson), December 2, 1901.

(II) Beacon and Middle Key.

John Sully and wife to Henry Johnson, April 24, 1895. (Beacon and Middle Key).

Johnson and wife to Edward Records,

April 25,

April 25, 1895. (Beacon Key).

Edward Records to Paul Cravath, May 24, 1895. (Beacon Key).

Henry Johnson to Charles Campbell, July 22, 1896. (Middle Key.)

Charles Campbell to the Fidelity Trust Co., July 19, 1898. (Middle Key.)

(3). Leases:

Jennett to H. W. Heironimus and W. Fensley, July 5, 1877 (right to work the guano on Serranilla, Jennett to get seventy-five cents a ton royalty).

2. Assignments under the Claim of Quinan.

(a). (1). Pascal Quinan to Henry Harper, June 26, 1884 (all interest in Serranilla Keys). This deed is alleged to have been filed without authority, and in violation of a promise.[344]

(2). Henry Harper to Pascal Quinan, June 26, 1884 (declaration of trust).

(3). Pascal Quinan to Henry Harper, November 18, 1884 (declaration of trust cancelled, and all interest on Serranilla conveyed to Harper).

(b) (1). Pascal Quinan to Philip Snowden, October 13, 1884

344. J. Stanley Frederick to Frelinghuysen, Sec. of State, Oct. 7, 1884. 6 MS. Miscl. Let. re Guano 2030.

1884 (guano on Serranilla).

(2). Snowden to Barton Jones and R. R. Roberts, June 11, 1891.

(3). Jones and Roberts to Morgan Wise, June 29, 1893.

(4). Morgan Wise to R. R. Roberts, April 26, 1897.

(5). R. Roberts to Robert D. Ruffin, December 12, 1899.

R. D. Ruffin to William H. Parsons, August 15, 1904.

R. D. Ruffin to Atlantic and Pacific Guano Co., October 11, 1905.

Atlantic and Pacific Guano Co., to the Tradesmen's Trust Company, October 17, 1905 (deed of trust).

(6). R. R. Roberts to Spencer Stilwell, April 14, 1904.

R. R. Roberts to Southworth, as trustee, September 21, 1905.

R. R. Roberts to Edwin Christy, October 11, 1905.

(7). Edwin Christy to the Atlantic and Pacific Guano Co., October 17, 1905.

Conclusions.

Conclusions.

William Van Derlip appears to have the record title to Serranilla islands, and to have been recognized by the State Department as the Assignee of the first Discoverer, J. W. Jennett, who was entitled to file the bonds, and to obtain the protection of the United States.[345]

345. See H. Wilson, Acting Sec., to John Fitzgerald, Jan. 6, 1913 (811.0141 Se 6/3); A. A. Adee, 2nd Assn't. Sec. to A. C. Stewart, Feb. 19, 1919, and Memos. (811.01422).

Errata

DEPARTMENT OF STATE

THE LEGAL ADVISER

September 27, 1932.

Serrana:

On Page 105 it is said that "no record has been found of any acts of occupation, or any assumption of jurisdiction by Colombia over Serrana until 1915." Subsequently, evidence was discovered showing that in about 1894 Arthur Brash, an American citizen, obtained a concession from the Colombian Government granting him the sole right to remove the guano deposits from Serrana. He stated: "it has occasioned me trouble and time to get the matter straightened out, with the Colombian Government, ... and the Department does perfectly right in not recognizing these claims, because the Guano Act does not contemplate the stealing of other peoples or nations property... ."[1*] The Department replied that Brash's statement regarding Serrana Keys had been noted.[2**]

1* Arthur Brash to E. F. Uhl, Ass. Sec., Oct. 16, 1894, I.MS. Miscl. Let. Re Guano, Alacrans.

2** W. Gresham, Sec. of State, to A. Brash, Oct. 20, 1894, 199 MS. Dom. Let. 196.

Additional Assignments of Guano Deposits on Serrana.

1. a. J. W. Jennett, by Jennie Jennett, Att'y, to Cleveland W. Goff, February 6, 1891, "all the following described property.... Booby Key, Sandy Key, Anchor Key, Three Triangle Keys, North East Key, Two Northwest Rocks situated in the Caribbean Sea."[3]

b. Cleveland W. Goff to John V. McDuffie, May 20, 1891 release of 1/2 interest in above-named Keys.[4]

c. Cleveland W. Goff to Harriet L. Scribner, May 27, 1891, release of 1/4 interest in above-named Keys.[5]

2. a. J. W. Jennett to Edward Steele, October 15, 1883, Guano on North Key, one of the Serrana Islands (also 3 Alacrans Keys).[6]

b. Edward Steele to James S. Rogers, May 1, 1884, same interest.[7]

c. James S. Rogers to The South American Bird Guano Co., of N. Y., May 31, 1884, same interest.[8]

d. James S. Rogers to John L. Piper, November 4, 1887, same interest (the deed to the South American Bird Guano Co. being cancelled for failure of consideration).[9]

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[3]Filed in 3 MS. Miscl. Let. Re Guano, Booby.
[4]Ibid.
[5]Ibid.
[6]Ibid, Alacrans.
[7]Id.
[8]Id.
[9]Id.

Serranilla

On page 171, before the new paragraph, the following should be inserted: The Aves Guano Company, one of Jennett's assignees, filed a bond for Serranilla Keys, dated September 13, 1880. Attached to the bond is the notation, dated October 27, 1880, and signed by John Hay, Acting Secretary of State: "The within Bond approved." This is not the only bond on file so marked.[10]

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[10] The bond also included the island of "DeAves." Bonds, Department of Commerce & Labor, Bureau of Navigation Files, 53500n; See Acting Sec. of Treas. to Sec. of State, Oct. 12, 1894, MS. Miscl. Let. Part I, October 1894 and enclosures.

ESR.
Le:ESR:IMS:SS

THE TREASURY DEPARTMENT'S LIST OF GUANO ISLANDS

Judge Moore notes that "Two formal lists of guano islands appear to have been made in the Treasury Department", and calls the list dated February 12, 1869, the "first" list, although stating that it was described as a "corrected list".[1] An earlier list, dated August 23, 1867, has now been found, and this also is called a "corrected list", indicating that there was one of a still earlier date.[2] Printed copies of these two lists are in the State Department Archives.[3] A typewritten copy of another list, dated December 22, 1885, according to Judge Moore,[4] was transmitted to the State Department by the Treasury Department July 3, 1890.[5] Another typewritten copy was similarly transmitted on September 20, 1893, and was said to contain the list of guano islands "as appears from bonds on file in this Department [Treasury], September 16, 1893."[6] These two copies are practically

1. I Moore's Digest 566-567.
2. 6 MS. Miscl. Let. re Guano, Sombrero.
3. Id.; Id, Miscl.
4. I Moore's Digest 567.
5. 6 MS. Miscl. Let. re Guano, Miscl.
6. Id.

practically identical, and contain exactly the same islands.

These four lists are the only ones which appear to have been filed in the State Department Archives. There probably were other lists, however, compiled by the Treasury Department. The statement on the circular of August 23, 1867, that it is a "corrected list" supports this assertion.[7] The Secretary of State's reply to the first complaint of Colombia regarding the claim of the United States to Roncador and Quito Suenó,[8] and the Memorandum of the grounds for the Colombian claim to those islands, presented to the Department in 1893,[9] refer to a list of 1871, and, although no other record of this list has been found in the State Department, it may well have existed.

These lists of islands appeared on circulars issued by the Secretaries of the Treasury to the Collectors of Customs. The following instructions on the circular of February 12, 1869, are typical of those on the other lists, so far as can be determined from the State Department records:

"To

7. Supra, Note 2.
8. Blaine, Sec. of State, to Don Julio Rengifo, Colombian Minister to U.S., Jan. 19, 1891, VII MS. Notes to Colombia 178.
9. Julio Rengifo, Colombian Chargé d'Affaires, to Sec. of State, Jan. 18, 1893, 8 MS. Notes from Colombia.

"To Collectors of Customs:

"You will find hereto annexed a corrected list of the Guano Islands, bonded under the Act of August 18, 1856, as appears by the bonds and papers, transmitted from the Department of State, now on file in the office of the First Comptroller of the Treasury.

"The several islands named and described in said list having been duly bonded, and considered by the President of the United States 'as appertaining to the United States,' in manner and form prescribed by said Act, and, as a consequence thereof, brought under the laws regulating the coasting trade, your attention is directed to the same with a view to the proper enforcement of these laws regulating intercourse with said islands.

"By the first proviso of the second section of the above-named Act [11 Stat. 119] it is provided:

"'That no guano shall be taken from said islands, rock, or key, except for the use of citizens of the United States, or of any persons resident therein' [For partial suspension of this prohibition see second section of the Act of July 28, 1866.]

"It is further provided by the aforesaid second section, that 'The introduction of guano from said islands, rocks, or keys, shall be regulated as the coasting trade between the different parts of the United States, and the same laws shall govern the vessels concerned therein.'

"And, as the laws of the United States forbid foreign vessels from engaging in the coasting trade, and as commercial intercourse with these islands thus form a part of the said trade, you are hereby requested to use all due vigilance to prevent the infraction of any law or regulation upon that subject." [10]

Judging

10. 6 MS. Miscl. Let. re Guano, Miscl.

Judging by the wording on these circulars, they would appear to be strong evidence of an intention on the part of the United States to exercise jurisdiction over the islands named therein. The history of the islands does not support this conclusion, however. In one instance only (with the possible additional exception of Sombrero) did the State Department request the Treasury Department to remove certain islands from the lists, and this was done, apparently, because Mexico specifically asked to have it done.[11] In the case of Pedro Keys, damages were paid to Great Britain for the wrongful detention of a British vessel, -- due to the fact that Pedro Keys appeared on the Treasury Department's list of guano islands, -- and yet Pedro Keys remained on the Treasury Department lists.[12] Moreover, the same islands are listed twice, at slightly different positions, presumably because they were bonded twice, by two different parties;[13] non-existent islands are listed,[14] and islands are included which the State Department had admitted

11. See Memo on The Sovereignty of Guano Islands in the Caribbean Sea, p. 129 et seq.; I Moore's Digest 569.
12. See Memo, supra, note 11, Pedro Keys, p. 102.
13. See Memo, The Sovereignty of Guano Islands in the Pacific Ocean, Phoenix Islands.
14. Id., Islands Probably Non-existent.

admitted belonged to a foreign jurisdiction.[15]

It is apparent that the mere inclusion of an island on these lists does not necessarily indicate that the United States claimed sovereignty over it. The lists were compiled from the bonds filed with the Treasury Department,[16] and indicate only that the so-called island was bonded under the Guano Act of 1856.

15. See Memo, supra, note 11, Pedro Keys, Morant Keys.
16. See Acting Sec. of Treas., to Sec. of State and enclosures, Oct. 12, 1894, MS. Miscl. Let. I, Oct., 1894.

Le:ESR:VHC:SS

THE SWAN ISLANDS CASE

FREDERIC A. FISHER
LEGAL ADVISER'S OFFICE
DEPARTMENT OF STATE

September, 1931

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DEPARTMENT OF STATE

THE LEGAL ADVISER

Oct. 17-1931.

I.

INTRODUCTION

Swan Islands, small in size and lying in the Caribbean Sea at a point 98 miles from the mainland (the coast of Honduras), have been known to mariners and cartographers for approximately four centuries. Only recently, however, has the question of sovereignty been raised and seriously considered. The Government of Honduras has manifested, prior to the last decade, an indifference quite at variance with its present agitation. This Government, despite the exploitation of the islands under the Guano Act, has, until recent years, given no serious attention to the status of the islands and the legal relation which they bear to the territorial area of the United States. However, the issue has now been drawn and the question of sovereignty must be determined.

This change of attitude on the part of the two governments is the direct consequence of the strategic and scientific value possessed by the islands by virtue of location. The Honduran Government has suddenly realized that the islands lie on the northern trade

routes

routes to the proposed Nicaraguan canal. This discovery is set out in an "exposé" on Swan Islands written by one Dr. Antonio C. Riverá, member of the Permanent Commission of Congress and approved by the Commission. (See despatch from our Legation at Tegucigalpa - June 6, 1929 - 811.0141 Sw 2/125). This government has come to the realization that the islands are well qualified to serve many essential purposes. Thus - the Secretary of War, under date of August 21, 1930, wrote (confidentially) to the Secretary of State (811.0141 Sw 2/130) -

> "The history of Swan Islands shows that during recent years activities have been such as do not constitute that active sovereignty so desirable in support of the claims of the United States. The discontimuance of the wireless station by the United Fruit Company, and the meteorological service by the United States Government, leaving only temporary and intermittent service by the Tropical Radio Telegraph Company, direct attention to the advisability of further consideration of useful purposes for which Swan Islands may be employed.
>
> "The War Department in its consideration of the subject recognizes the importance of maintaining a light on Great Swan Island as an aid to serve sea traffic, but attaches the utmost importance at this time to the establishment and maintenance as well of a meteorological station, a radio beacon station and an airplane landing field to meet the increasingly urgent military needs for direct flights between the United States and the Panama Canal Zone. The rapid development of aviation, and the increased frequency of flights prompt a consideration of provisions whereby the War Department will not be obliged to solicit the authority of foreign governments and subjected to the dangerous delays involved for military flights to Panama so vital in the plans for national defense.
>
> "In

> "In order to meet the requirements of military necessity, therefore, the War Department is desirous of executing a lease with the Swan Island Commercial Company, in which actual title to Great Swan Island is vested, for the purpose of establishing and maintaining for a period of years an airplane landing field, meteorological station, radio-beacon station and such other activities incident and necessary for operation. With knowledge of the position and claims of the Government of Honduras, and with an appreciation of the feeling generally prevailing throughout Latin America toward the United States, it is the purpose of the War Department to execute no instrument nor effect any agreement, nor to take any action which might in any way disturb the discussion of existing claims of sovereignty or which might involve other claims or obligations upon the part of the United States, or which might tend to create unfavorable international feeling."

The letter sums up the principal value of the Islands to the United States. The Navy Department is not indifferent to the question but, the war being over, is content to base its recommendation for assertion of sovereignty on two considerations: the forestalling of any other nation; and the maintenance of a Navy Radio Station. (Letter - Navy to State - August 28, 1919 - 811.0141 Sw 2/63.) However, the same department felt, years later, that it was not justified in maintaining a radio station on the island. (Navy to State - January 14, 1928 - 811.0141 Sw 2/95). The actual use of the islands for a meteorological station will be discussed post.

The interest of this Government having been aroused it took prompt action when a report was received from the firm of Lansing and Woolsey (Letter of May 20, 1921 - 811.0141

Sw 2/66) that it was believed that the Governor of the Bay Islands (Honduras) was enroute to the Swan Islands to take possession for his Government. The Department cabled the Legation at Tegucigalpa to check this report and "to ascertain under what claim of right the Government of Honduras is directing the reported action". A reply (Telegram of May 30, 1921 - 811.0141 Sw 2/67) was received stating that the Minister of Foreign Affairs had conferred with the President, that the answer was made that the Honduran Government had sent no one but contemplated sending a commission to Swan Islands "as an administrative measure as these Islands are territory over which Honduranean people claim sovereignty." See also the subsequent despatch from the Legation and an enclosed note from the Minister of Foreign Affairs. (May 30, 1921- 811.0141 Sw 2/68).

The Honduran position led to the instruction to the Legation of July 12, 1921 (811.0141 Sw 2/68) in which it was stated -

> "You are instructed to reply to the Note of the Minister for Foreign Affairs stating that the Swan Islands appertain to the United States, whose citizens discovered them and have since remained in full possession, and that in the opinion of this Government it would be easier to effect a satisfactory settlement of the contentions of the two Governments if Honduras refrained from any attempt to take possession of the islands, thus maintaining for the present the status quo."

(The

(The inaccuracy of the statement as to discovery will be apparent from later discussion.)

The suggestion as to the "status quo" and discussion through diplomatic channels, as advanced by the Legation, was acquiesced in by the Honduran Government. That Government took prompt measures to prepare its case. Legislative Decree No. 57 of February 23, 1922 provided, in Article 2 -

> "The Executive Power is hereby urged to carry on without loss of time the discussion which the North American Government has proposed through diplomatic channels, and to show as a consequence that the islands referred to form part of the Honduran territory, this action being taken on the rights of sovereignty and possession which have been and are now unquestionably exercised by Honduras over the Swan Islands in the Caribbean Sea."

Article 3 recommended that the Executive Power appoint a Commission, to report at the next session of Congress. (Despatch from Honduras - June 6, 1922 - 811.0141 Sw 2/74).

The Commission was duly appointed, the members being - Don Rómulo Durón and Don Agusto C. Coello. (Despatch from Honduras - October 4, 1922 - 811.0141 Sw 2/80). The Report of the Commission was transmitted to the Department in despatch of November 21, 1923 (811.0141 Sw 2/82).

In an instruction to the Legation at Tegucigalpa (August 30, 1922 - 811.0141 Sw 2/77) the Department referred to the above decree and stated that the Minister should inform the Honduran Government that "this Govern-

ment

ment will be pleased to enter upon a discussion of the matter diplomatically."

A despatch from the Legation under date of November 21, 1923 (811.0141 Sw 2/82) stated the receipt of a note from the Foreign Office expressing the readiness of the Government of Honduras to proceed with the proposed discussion. A copy, with translation, of the note was attached. Reference was made therein to another proposed expedition to the islands by the Governor of Atlantida; the expedition was postponed.

Thus, this Government has committed itself to the settlement of the issue through diplomatic channels, the status quo to be preserved. Acts of jurisdiction are precluded; the Honduran contentions must be considered and the American position determined.

II.

HISTORY OF THE ISLANDS.

A. Documentary Material and Statements.

The facts of first discovery of the islands lie veiled in obscurity. It seems clear that their existence, under one name or another, has been known for about four hundred years. Such knowledge found origin, probably, in the position of the islands on early trade routes rather than in the doubtful value of the islands themselves.

They have possessed a number of names in the course of the centuries. This will be readily apparent from the discussion of cartographic material, post. It may be said here that the islands have carried the names "San Millán," "Mc. Millan", "Santillán", "Santa Anita", and "Santanilla". (Memoria de la Secretariá de Estado - Relaciones Exteriores - 1920-1921 - page 21). The names "Sanilha" and "Santillana" have also been found.

The name "Santanilla" was recognized by this Department. On June 24, 1857, the Acting Secretary of State addressed a letter to the President (Report Book - No. 7, p. 381) transmitting the papers relating to Swan Islands in an application filed under the Guano Act. In this letter it was said -

"The

"The islands referred to are doubtless those known to the maps as 'Santanilla' or Swan Islands and described in the Gazetteers as 'two islands of the Caribbean Sea, at the entrance of the Bay of Honduras, 150 miles n. of the Mosquito Coast'".

Considerable search not having revealed the facts of discovery, I can give general approval to the following quotation from the Honduran Commission's Report, entitled "Las Islas del Cisne" (hereinafter to be referred to as - Honduran Case), p. 4 -

"It has been impossible to find exact documentary proof of the date of discovery of these islands or the name of their discoverer. But it can be safely stated that they were discovered in the same period as the Lesser Antilles, that is, before 1520."

Reference is then made to the voyages of Columbus. It is indeed possible that Columbus passed in their vicinity on his way to Cape Gracias a Dios in the year 1502. (See Hakluyt Society's Publication "The Discoveries of the World" - Gabano. Published by Hakluyt - 1601. Vol. 30, p. 100). In the event the islands were seen it follows that their existence was known early in the history of Spanish occupation of the Indies. But the origin of the earliest name - San Millán - remains unexplained save for the suggestion that the islands "must have been discovered by some leader named San Millán or a native of San Millán, a town in the province of Alava, in Spain - - -" (Honduran Case, p. 4).

Seemingly

Seemingly the first geographical reference to the islands is that made in the - "Geographic and Universal Description of the Indies, compilation of Juan Lopez de Velasco, Cosmographer, Chronicler, from the year 1571 to the year 1574 - Madrid, 1894." It was there stated, pp. 315 - 316 "San Millán: A small island close to the shore of Cape Camarón, six or seven leagues to the north". (Memoria de la Secretariá de Estado - op. cit. p. 201). The "league" was, I am informed, a most inconstant unit of measurement at this time.

A description of the coast of the Province of Honduras may be found in Volume XV - Collection of Unpublished Documents, relative to the Discovery, Conquest and Organization of the former Spanish Possessions in America and Oceanica - Archives of the King etc. Madrid, 1871. On pages 469 - 470 the following appears, inter alia -

> "from which point to Cape Camaron, toward which you go from Xamayca, there are thirteen rivers and the point of the cape a bank or shoal extending more than twenty leagues to the sea; and in the middle of it, near the coast, a large island called the Baxos and another to the north, near the bank, called San Millán - - -". (Memoria de la Secretariá de Estado - op.cit, p. 202; also, Honduran Case, p. 10).

Volume XV of Hakluyt's Voyages (Goldsmid's Edition) entitled "Navigations, Voyages, Traffiques and Discoveries of the English Nation - West Indies" - contains a narrative relating

relating to the voyage of "Master William Parker of Plimmouth" to points in the Bay of Honduras (1596). There is a list of sailing directions and of islands, latitudes being given. In this latter list the following appears - "The isle of Centanilla or Santanilla in 17 1/4." The Honduran Case states, p. 11 -

> "The islands of San Millán, from 1586 to 1604, have changed their name: they are now the islands of Santanilla, a name which they were to keep until the end of the 19th century, despite the fact that the former name was still to be recalled."

For a possible explanation of the origin of the name "Santanilla" see the Honduran Case p. 13, where reference is made to Captain Santillan, probably in command of a Spanish man-of-war, around 1639.

The interesting suggestion is also made (Honduran Case p. 15) that a certain Captain Swan gave his name to the islands. Accounts vary, as stated, as to his connection with the pirates and the purpose of his journey to the Spanish Main. The account given may be supplemented by reference to Bancroft - History of Central America - V. 2, p. 549 et seq. His shipwas the Cygnet! This story should be considered in conjunction with the historical note in the "Central America and Mexico Pilot (East Coast - U.S.H.O. No. 130 - 1927) where it is stated, p. 245 -

"The

"The buccaneers, under a Captain Swan, were probably the first to set foot on these islands. There are the remains of their breast-works on the west island."

A similar statement is found in the "West Indies Pilot" of the British Admiralty - V. I (8th Ed. - 1923). The accuracy of the claim of earliest occupancy by Captain Swan is questioned in the Honduran Case. (p. 16).

In 1776 one Joaquín del Castillo reported to the Governor and Captain General concerning an expedition (in 1760) undertaken by him to determine the reefs from Cape Catoche to Huacos Point and to the mouth of Dulce Gulf. A map was prepared, a copy of which was submitted with the Honduran Case. This map shows the Swan Islands (Santanilla) in approximately their correct position and carries a marginal description of the territory covered. In this description the following passage appears -

"Santanilla is placed by all the geographic maps east and west of Guanages sixty leagues off, and it is not so because Santanilla and Guanajes look east northeast and west southwest, and are about thirty-eight leagues apart; the island has a shoal of four fathoms along the southern shore, and any boat of average draft may find a shelter there."

In a note at the end reference is made to the coloring of the map -

"to show both the provinces to which it belongs and also the knowledge that must be had of the coasts that are not inhabited by subjects of our sovereign along its border, which is all yellow".

The

The significance of such coloring is not apparent from the copy submitted; nor is any mention thereof made in the Honduran Case.

On page 55 of the Case reference is made to the geographic section of the "Memorias de Jalapa" (1830) in which one Manuel Montúfor described "the islands which form part of our territory." Although the three large islands comprising the group known as the Bay Islands were named the only reference to other islands is general -

> "There are other smaller islands, and the Gulf of Honduras is studded with cays which resemble floating woods: much tortoise fishing is done on them, and on some there are country houses".

Such indefiniteness is hardly persuasive of anything, save that the Swan Islands, if intended to be included, were of too little importance to be given specific mention.

In the Honduran Constitution of 1839 (Honduran Case, p. 57) the boundaries of the State were delimited. No reference was made to particular islands - the phrase used was "y las islas adyacentes a sus costas" - that is, the islands adjacent to its coasts. This phrase appears later; vide, Honduran Case, p. 58; ibid, p. 65; ibid, p. 67; Constitution of 1848 (ibid, p. 72); ibid, p. 77; Constitution of 1865 (ibid, p. 101); ibid p. 103 (Decree creating Department of Mosquitia); Constitution of 1873 (ibid - p. 104); ibid, p. 131.

In

In 1856 James Imray published (in London) a work entitled "A Nautical Description of the Gulf of Mexico and the Bay of Honduras". On page 169 thereof there is a description of Swan Islands but no statement is made as to sovereignty. The description was taken from the report of Captain G. Sydney Smith, commanding H.M.S. BUSTARD - 1827-1828. No mention was made in this report of the occupancy of the islands. A search was made for water, to no avail.

Following a treaty between Great Britain and Honduras (ratified in 1860) by which the sovereignty of Honduras over the Bay Islands (specifically named - Swan Islands not included) was acknowledged, the Honduran Minister of Treasury and War was authorized to take possession. He was deterred from doing so by rumors of Walker's activities in the islands. The Superintendent of Belize voiced the suspicion that the filibusters had gathered on the Island of Santanilla. Official despatches from Trujillo informed the Government that Walker et al. had left Roatan for the "Islands called Satanillas (Santanilla), seventy leagues distant from the port; and that they were still on those islands awaiting reinforcement - - -". (Honduran Case - p. 91 et seq.)

This reference will serve to terminate the early

history

history of the islands. Their further connection with the Governments of Honduras and the United States will be developed under Part III of this memorandum, entitled - "Claims of Sovereignty."

B. Cartographic Material.

Before reference is made to early material the following accurate description should be given. It is taken from the "Central America and Mexico Pilot - East Coast - (U.S.H.O. No. 130 - 1927) - p. 245.

> "Swan Islands (17° 25' N., 83° 56' W., H. O. Chart 5170.)
>
> "These two islands are situated 98 miles northward of Patuca Point, the nearest part of the coast, and lie upon a narrow bank."

The following references in no way represent an exhaustive compilation of available material. They serve, however, to fix the Swan Islands in the march of the centuries. Sufficient material has been examined to justify the conclusion that one can hope to gain little more from maps and charts than a knowledge of geographical location. Extensive search might reveal a documented map or one made a part of documentary material from which exact knowledge of territorial possessions or extent of sovereignty might be secured. The search has revealed no map of this character. (Possible exception - Map of

Joaquin

Joaquin de Castillo). The following maps further serve the purpose of obviating the necessity of duplication of effort in the event the Swan Islands are made the subject of further discussion. (Acknowledgment should be made to the Geographer's Office for assistance rendered in this search).

The earliest map found bears the date 1568. It consists of a portion of a map by Diego Homem showing Central America and the West Indies. (It may be found at the back of volume 62, second series, of the Publications of the Hakluyt Society, entitled - "Spanish Documents, concerning English Voyages to the Caribbean - 1527-1528.") The map is necessarily inaccurate; however, in approximately the correct position three small islands are grouped and designated thus "S - ana". There is no indication of sovereignty.

Part of a map in the Geographical section of the Bibliothèque Nationale, Paris, bearing the legend "Ceste Carte a este faicte par Jacques de Vaulx Pilote entretenu Pau (sic) le Roy en le Maryne au Houre 1584" shows the Islands under the name of St. Muilah. (The name is indistinct). There is no definite indication of sovereignty except that the word "Espaignes" appears on the southern portion of Mexico. Although the map covers present

southern

southern Mexico, Central America, and Colombia, the name of no other country is given. (L. of Cong).

In a volume entitled - "Descripcioned Las Indias Ocidentales de Antonio de Herrera coronista Mayor de su Mag^{d} de las Indias y see coronista de Castilla." published in Madrid in 1601, the Islands are not shown on a map entitled "Description del destricto del Audiencia de la Española". On another map (page 32) in this volume entitled - "Decripcion del Audiencia de Guatemala" one Island, under the name of S. Millan is shown off Cape de Camaron. The Island is mentioned in the text, page 36. There is no positive indication of sovereignty. (L. of Cong.)

Guzman's Recordacion Florida", written in the 17th century and copyrighted in 1905 by George Barrie and Sons shows, on a map of Central America, the Island of S. Millan. The Island bears the same color as the whole mainland which includes the present southern portion of Yucatan and a portion of Mexico, to the west, to the Panama Republic. The name "Provincia e la Taguagalpa" appears along the eastern portion of present day Honduras and Nicaragua. (L. of Cong.)

In the "Boletin del Centro de Estudios Americanistas de Sevilla" No. 17, January 1916, there was an article referring to three maps. The third was a map by one Francisco Nevarro, dated April 29, 1604, which included

the

the Gulf of Honduras from Cape Cotache to Cape Camaron. Santanilla was the name given certain islands in the interior of the Gulf. (Memoria de la Secretariá de Estato, op. cit. - p. 203). The fact that this map included the islands named Santanilla is of little significance, for the purpose of Navarro's voyage was the examination of the coast that a better port might be found. (History of the Kingdom of Guatemala - Don Domingo Juarros, p. 314. A translation was published in 1824. The translator states that the author was "a dignified Secular Ecclesiastic, and Synodal Examiner of the Archbishopric of Guatemala", having access to State and religious records.)

In the world map of 1605 by Blaeu (a copy belongs to the Hispanic Society of America, New York) the name Santanilla appears off Cape Camaron (ibid, page 203).

In the "Hondius World Map" (1611) edited by Stevens and Fischer, the Islands appear under the name of Sanihla in front of Cape Camaron. (Ibid, page 203).

In a work of Antonio de Herrera entitled "Novis Orbis sive descripto indial occidentalis" the islands appear on a map (Amsterdam, 1622) of the territory included in the whole Audencia of Guatemala, under the name of San Millán (Central University of the Republic). This reference may be found in an enclosure to a despatch from the Legation

at

at Tegucigalpa under date of November 21, 1923. (811.0141 Sw 2/82).

Goos' l'Atlas de la Mer (Amsterdam, 1670) contains charts showing the islands under the name of Santanilla. There is no indication of sovereignty. (L. of Cong.)

In the Atlas of Montanus entitled "Dutch Nieuve Onbekende Weereld" there is, page 230, a map of New Spain, New Galancia and Guatemala as of the year 1671. On the map the San Millan islands are shown north-northeast of Cape Camaron. (Memoria de la Secretaría de Estado op.cit. page 202).

The "English Pilot" (London 1706, 4th Book) shows a group of Islands under the name of S. Milan. The edition of 1780 contains a chart showing a group of small islands under the name Santanilla. St. Millan is mentioned, page 63, as situated on a great shoal and as consisting of two islands. The same description may be found in the edition of 1706. There is no indication of sovereignty. (L. of Cong.)

The work entitled "Novae Hispaniae, Chili, Peruviae, et Quatimalae Littoreae" - R. &. I. Ottens - (1756?) shows the islands under the name of Santanilla. That part of the mainland embracing southern Mexico, Yucatan, Honduras and labeled Nova Hispania is in one color. However, the islands are not colored and are shown within the area described as "Gulfo de Honduras". No indication of sover-eignty. (L. of Cong.)

The "Plano Geografico de la mar" (1776) shows certain Islands near Honduras but they appear to be too far to the south to be the Swan Islands. The map covers the area of present Yucatan to Panama and carries an explanatory text in indistinct and small Spanish script. The description deals with the "Coste del Norte". The map bears on it the name of "Provincia de Yucatan and Provincia de Honduras". (L. of Cong.).

Terrez's map of Central America (from Ms. in Arch. Gen. de Indias - Guatemala, 1772) carries the name Santanilla. Part of the legend reads "Piloto que hacido (?) ...Real Armada... 22 de Junio 1776. Juan de Torrez". There is nothing definite as to sovereignty. The map covers present Florida, Cuba, Yucatan, Honduras and Nicaragua.

In 1787 there was printed for William Faden, Geographer to the King, (London) "a map of a part of Yucatan or that part of the eastern shore within the Bay of Honduras allotted to Great Britain for the cutting of log wood in consequence of the convention signed with Spain on the 14th July 1786 - by a Bay-Man". On this map "Swan's Islands" are not shown. However, there are two lines leading to the point on the coast (off Belize in British Honduras) to the right margin of the map bearing the legend "Track from Swan's Islands".

The

The reason for these lines and the legend is not apparent unless perchance they were designed for sailing directions beyond Swan Islands. In the above map there is an insert bearing the title "Mosquitia" or the Mosquito Shore with the Eastern Part of Yucatan...by William Faden, Geographer to the King. Swan's Islands are shown although they are not colored as in the section labeled - Mosquito Shore. The island Rattan (Roatan) is so-colored. Swan Islands are colorless like Honduras, Yucatan, Nicaragua, etc. (L. of Cong).

A volume entitled "An account of the British Settlement of Honduras" (London, 1809) by George Henderson is illustrate with a map published in 1809 by C. &. R. Baldwin of Bridge St. Blackfriars. This map shows two islands off Cape Camaron under the name "Swan Islands"; to the northwest of these islands between them and Misteriosa Islands, there appears another Island under the name of "Santanilla". (L. of Cong.)

In Thomson's new General Atlas (1816) a map of the southern part of Spanish North America appears. As in the preceding map Swan Islands are marked out and to the northwest of them is shown another Island named Santanilla. Honduras is shown in green outline, the Swan Islands, Jamaica and the northern portion of British Honduras are all in the same color, namely pink. There is nothing to indicate positively that color indicates sovereignty. The Islands Bonaco, Rattan and Utila are shown in green as are also

the Little and Great Corn Islands.

In 1826 A. Arrowsmith, hydrographer to His Majesty published in London a map of Guatemala reduced from the survey in the Archives of that country. The Swan Islands are placed under the name of Yas Santanillas. The map covers the area south of present Yucatan, the Panama Republic. It would seem that this whole area is shown as Guatemala except possibly "Costay Ryca" and Veragua".

Around 1845 Dally published under the auspices of "Compagnie Belge de Colonisation" and dedicated to Leopold I the King of the Belgians his "Nouvelle Carte Physique, Politique, Industrielle Le Commerciale de l'Amérique Centrale et des Antilles....dressée d'après les documents officiels". On this map the Islands are shown under the names "Santanilla on Ile des Cygnes". Although the map shows sovereignty by color the small islets are not colored. The map covers present Mexico to Colombia (L. of Cong.).

A map of Central America published in 1856 by Morse and Gaston, New York, gives the name Swan Islands to the islands but there is no indication as to sovereignty.

In 1856 James Wyld, Geographer to the Queen, published (London) a map of Central America showing the different lines of Atlantic and Pacific communication. Swan Islands are named but there is no indication of sovereignty.

(L. of Cong.).

In 1856 the Office of the United States Coast Survey executed a map of Central America compiled from materials furnished by the Committee on Foreign Relations of the Senate of the United States. Swan Islands are named but there is no indication of sovereignty. (L. of Cong).

In 1862 there was published in Guatemala a "Carta de Los Estados de Centro America" por Er^to Vital J. van-de-Gehdchte, segun el orijinal a el dejado por su difunto padre." The Islands bear the names I. de los Cisnes and Santanillas. There is no indication of sovereignty. (L. of Cong.).

In 1886 one A. T. Byrne C.E. prepared a map on Honduras mines and mining - "Mapa de la República de Honduras", published by Colton and Company, New York. This map does not show the Swan Islands, the northern limit of the map falling short of their position. The same is true of a later revised map published in 1900. It is possible that these maps are official (L. of Cong.).

In 1890 the "Instituto Nacional de Geografea" published in Madrid the following work - "Atlas Histórico - Geográfico de La Republica de Costa-Rica, Veragua y Costa de Mosquitos para server al Arbitraje de la Cuestion de Limites entre Costa Rica y Colombia. Ordenado por D.Manuel M. de Peralta, Enviado Extraordinario Min. Plen. de Costa Rica." Pl. No. II is entitled "Descripcion de Audencia de Guatimala" prepared by the Institut National de Geographie, Bruxelles.

Bruxelles. The Islands bear the name S. Millan. The map is done in black and white and there is no positive indication of sovereignty. The map covers the area of present Guatemala, Honduras, Nicaragua and Costa Rica as well as a portion of Panama.

Pl. No. V, bears no title but was published by the same Belgian institution. The Islands bear the name Santamilla.

Pl. No. VIII is a map entitled "Audience de Guatemala". par N. Sanson d'Abbeville Geographe ord^{re} du Roy Avecq Prevel p^{r} 20 Ans." Paris 1657. This map does not include Swan Islands since it extends only to 18^{o} north latitude. (L. of Cong.).

There was published by Halma in Amsterdam in 1907 a map carrying the following title "Landstreek van Guatimala door N. Sanson d'Abbeville Geogr Ordin du Roy" - but having as its source the following: "A. P. de La Croix: Algemeene Weerelddeschryving...Vol. III, pp. 352-353." The Islands consist of one major island surrounded by six islets; to the east northeastern lies a single islet but the latter and the former appears to have two names; first; Santamilla, and second S. Millan. "Guatimala" consists of the "Audience le Guatimala". Save for the title of the map, there is no indication of sovereignty.

III

CLAIMS OF SOVEREIGNTY.

A. Honduras.

The Honduran case finds expression in the report, already referred to, entitled "Las Islas del Cisne". An examination of this report indicates that all material, available as of its date, was utilized and relied upon. Indeed, the conclusion is justified that no arguments, however tenuous, and no circumstances, collateral or argumentative, were overlooked. Because of lack of facilities a complete translation was not made of the Honduran Case or its voluminous annexes. However, the Case was read carefully with a translator and the pertinent parts translated in writing. To obviate the possibility that relevant material may have been over-looked a translation of the whole might be made.

The Honduran argument may best be appreciated by consideration of the conclusions reached. (Honduran Case - p. 133 et seq.) They are -

> "1. The Swan Islands having been discovered between 1502 and 1520 by Spain, the dominion and possession of those islands were vested in that Nation from the first named of those years under the act of possession performed in Rio Tinto by the immortal discoverer of the new world up to September 15, 1921.
>
> "2. In the course of that time England alone disputed the territory of Honduras bathed by the

Atlantic

Atlantic Ocean and the adjacent islands in said Ocean from Spain, the said power finally recognizing the Spanish sovereignty over the said territory and islands by the Treaty of 1814.

"3. The title of dominion and possession of Spain over the Swan Islands and other adjacent islands and territory above referred to passed to Central America by virtue of its political emancipation and in that Central America to Honduras, which first as a province and next as a state formed part of the Federal Republic until 1839.

"4. When the Federation was dissolved, the said islands and territory remained under the exclusive jurisdiction of the State of Honduras.

"5. The governments and laws of Honduras, as well as those of the Federation and of Spain, have exercised the right to exclude vessels and subjects of other nations from using the said islands for any purpose whatsoever.

"6. The nearness of the Swan Islands to Cape Camarón and Guanaja removes any doubt that they were occupied by Honduras for all the purposes of valid occupation.

"7. As the said islands formed part of the field of operations of the pirates from 1643 to 1680 and also for the operations prepared by the adventurer, William Walker, in 1860 in trying to go to Nicaragua across Honduras to recover his power and conquer Central America, a fact which shows that the islands were well known.

"8. England contested with Honduras as it had with Spain the title to Mosquito territory, the Bay Islands and other adjacent islands, recognized in those territories, by virtue of the Clayton-Bulwer treaty, the sovereignty of Honduras and returned them to that country in accordance with the Wyke-Cruz treaty of 1859, and never again renewed the dispute.

"9. The various organizations given to the Mosquito territory up to the last in 1894 must be understood to include the Swan Islands as well as all the other islands and keys near the coast, standing in their corresponding geographic district.

"10.

"10. The appearance of Captain Alonso Adams in the Swan Islands whether as successor to the rights of the company to which it is said the United States Government leased the said islands for the exploitation of guano, or from his own occupancy in 1893 and his considering himself as their discoverer, did not and cannot confer upon him any right of ownership in the islands nor change their nationality, nor could he be considered as such discoverer in the presence of the facts that have been presented; and in that train of thought he could not lease as being his property any part of the larger island to the United Fruit Company for the building of the wireless station it erected there in 1910, nor could he sell as his own the said island to Doctor Will Brooks of Boston in 1916.

"11. Therefore, the United Fruit Company has no other right for erecting in the greater of the Swan Islands the wireless station above referred to than the lease from Alonso Adams, who could be neither the discoverer of the said islands nor the owner or holder of any of the, nor incorporate them with the United States so as to form part of its territory, and

"12. Although the note of the American Legation of August 11, 1921, says that American citizens discovered the Swan Islands and have remained in full possession since, the same note implicitly admits that the said islands do not belong to the United States since it is stated that 'in the opinion of that Government it would be very easy to arrive at a satisfactory settlement of the dispute between the two Governments if that of Honduras would restrain from any attempt to take possession of the islands, the statu quo being thus maintained.' If the United States tried to defend the Swan Islands as being its own territory, it would not have offered the settlement that is found in the note. In this train of thought the Government of Honduras must hope that in discussing the settlement the dominion of our nation over the Swan Islands will be expressly acknowledged, since it has been proved that they were not and could not have been discovered at the eleventh hour by American citizens and that they form part of the territory in the sovereignty of which the Federation of Central America and the Republic of Honduras succeeded Spain. The Honduran Government may make such conessions as it will deem acceptable to continue in those islands the

wireless

wireless station that has been erected there and for the other purposes that may be contemplated owing to its most important geogfaphic position; but the flag of Honduras must wave there as the symbol of our sovereignty."

Before the arguments culminating in these conclusions are set out, one of the major contentions of the Case may be readily disposed of. Much effort has been expended in the demonstration that Honduras alone of all States possessing territory in Central America (particularly Great Britain) can lay claim to the Swan Islands. It is doubtful if this contention can be controverted.

Throughout the dispute with Great Britain over the Bay Islands and the Mosquito coast there is no indication that the Swan Islands were involved or that Great Britain ever laid claim to them. Furthermore, a memorandum of the Latin American Division, dated June 1, 1921 (811.0141 Sw 2/81), states that there is no record of a British claim in the Department, either prior or subsequent to the cession of rights on the Mosquito Coast. In 1859 the Superintendent of British Honduras dispatched, on his own initiative, a vessel to Swan Islands to rescue American guano-diggers who had been abandoned there. Lord Napier informed the Department of this act and suggested reimbursement. There was no intimation of British claim to sovereignty. (See 50 Dom. Let. 115 - 51 Dom. Let. 18).

In

In 1911 the British Embassy at Washington communicated with the Department with regard to alleged ill-treatment of British subjects on Swan Islands and the intention was expressed of sending a war-ship to the islands. The Department was asked if the United States exercised jurisdiction over the islands. Reply was made that there could be no definite answer until receipt of evidence (already requested) as to the nature of American industry now being carried on there. The British position was clearly inconsistent with any claim to sovereignty. (811.0141 Sw 2/25). No British war-ship was sent but, upon request of this Department, a vessel was dispatched by the Navy Department to investigate conditions. (Letter of June 20, 1911 - ibid).

In 1927 Cuba suggested that Cuba, Great Britain, Mexico, and the United States jointly maintain a wireless and meteorological station on Swan Island. The offer was declined by this Government (Telegram to Embassy - April 18, 1928), the assertion of sovereignty being made. Great Britain also declined. There was no evidence of any claim to sovereignty by any of the nations involved, save the United States.

Nicaragua has made no claim to sovereignty, so far as can be ascertained. The Boundary Decision of 1906 by the

King

King of Spain, delimiting the boundaries of Honduras and Nicaragua, makes no reference to insular territory; nor was such territory considered in the later mediation of the United States. A certain ambiguity is found in the statement (Honduras Case, p. 117) that the Decision was in conflict with the Nicaraguan claim. On page 115 of the Case the line claimed by the Nicaraguan representatives is described; it was to follow, from a certain point, the meridian running through Cape Camaron "hasta internarse en le mar, dejando en Nicaragua Swan Island" - that is, until it reaches the sea, leaving Swan Island in Nicaragua. This description, including the quotation, may be found in that part of the "Informe presentado al Soberano Congreso National por el Señor Ministro de Relaciones Exteriores y Governacion - 1900-1901" (Honduras) which deals with Nicaragua, page 9. The boundary proposed by the Commissioners of Nicaragua is described in a report in the "Memoria presentada a la Asamblea Nacional Legislativa ---- por el ----Ministro de Relaciones Exteriores" (Nicaragua) for 1901. I found therein no direct reference either to Swan Islands or the islands off the coast. It seems doubtful that the Nicaraguan representatives actually named and considered the islands. On May 7, 1912, an article appeared in the New Orleans Item which stated, in part, that - "Colombia claimed Swan Island

for

for a time, but allowed her claim to lapse." (Honduran Case - Annex QQ). The basis for this statement is unknown.

It may be safely assumed that the only States which can make reasonable claim to the islands are the United States and Honduras. For the sake of completeness the following extract is included, taken from a letter of July 10, 1914, from the American Consul at Puerto Cortés, Honduras, to Gilbert H. Grosvenor of the National Geographic Society. (Copy in the Department's files - 811.0141 Sw 2/36). If the statements of the "old resident" were not allegedly based on "notes he made in going through the archives of the Honduranean Government at Tegucigalpa" they would carry little weight; as it is, I am inclined to doubt the soundness of particular assertions, especially in view of inaccuracies such as the date of the arbitration before the King of Spain. The extract is -

> "The dissolution of the Central American Union became effective in 1838, but the boundary between Nicaragua and Honduras was not definitely determined until 1909. The territory in dispute was that part lying between the Wanks and Patuca rivers. Nicaragua claimed to the Patuca River and Honduras claimed to the River Wanks. If the Patuca River was the territorial limit of Honduras on the East, the Swan Islands would be under Nicaraguan jurisdiction, for the islands had always been considered as Central American territory. Both Honduras and Nicaragua declined to push their claims to the islands fearful of a resulting war.
>
> "Great Britain laid claims to the Swan Islands at one time, together with other islands on the north coast of Honduras, but under the Treaty of

Wyke-

Wyke-Cruz her claims were relinquished.

> "In 1909 King Alphonso XIII of Spain arbitrated the boundary dispute between Nicaragua and Honduras, resulting in giving over to Honduras the territory up to the River Wanks through its lower course. By this act the jurisdiction of Swan Islands came definitely under Honduras. At the present time there is no organized government on the islands. There are possibly one hundred negroes on the islands raising or gathering cocoanuts."

Before the Honduran claim is taken up it seems desirable to briefly consider the attitude of the Honduran Government toward the islands prior and subsequent to the genesis of the present controversy. In a letter of August 19, 1914 this Department informed the Navy Department (811.0141 Sw 2/37) that "there appears to be no record in the Department of State of any claim or assertion of sovereignty on the part of the Government of Honduras." This statement is not quite accurate. For, in 1909 the Department received a letter (August 4, 1909 - Num. File - V. 191 No. 1804/6) from G. L. and H. T. Smith, attorneys for the Swan Island Commercial Company, in which it was alleged that at no time had the islands been in the possession of citizens of any government save the United States and that no other government had made claim to jurisdiction save for the recent claim of Honduras. The letter continued - "The Republic of Honduras, has, through the Honorable Alex Kirconnell, Consular Agent at Bonacco, notified the Swan Island Commercial Company that it claims

jurisdiction

jurisdiction over Swan Island, and that it intends to send a War Vessel to the Island to enforce its jurisdiction and rights." The intervention of the United States was requested. (The action of this Government will be discussed, post).

In a despatch dated November 21, 1923, the American Minister at Tegucigalpa transmitted the Honduran Case to the Department. (811.0141 Sw 2/82). An enclosure was a letter from the Ministry of Foreign Affairs, transmitting the Case to him. In the enclosure it is stated that in 1903 or 1904 one Major Edward A. Burke was employed to make investigations in the Honduran Archives; that the resulting data showed that there existed in the years 1835 to 1837 a concession to an American company to exploit guano deposits on the Swan Islands; that the Adams family fell heir to the rights and property of the company.

On page 122 of the Honduran Case reference is made to this same concession. It is there stated that Major Burke gave his information to the Honduran Secretary of State in 1921; that his report was made to President Bonilla and the "special file" sent to the "Commission of Boundaries with Nicaragua; that the present commission (preparing the Honduran case) has been unable to find either the documents or the "special file". On page 120 of the Honduran Case

the

the article of the New Orleans Item of May 27, 1922, referred to above, is set out. In this article the statement appears that during the twenty-three years of occupancy by the Adams family they suffered no molestation. This statement is not controverted.

On page 21 of the "Memoria de la Secretaria de Estado" (op. cit.) the following indefinite and undocumented statement appears:

> "When Independence was proclaimed the islands came under the jurisdiction of Honduras. Several of the governors granted concessions to foreigners to establish there and in the nearby regions of Mosquitia extracting plants.
>
> "In all of these concessions permission was granted to work, sell and export guano, phosphates or any other fertilizers that could be found on the islands and keys of the Atlantic belonging to the State, the grantees binding themselves to certain obligations.
>
> "There were also established fisheries in the Swan Islands. The concessioners allowed their contracts to lapse through failure to comply with their obligations but believing that they had vested rights they transmitted those that they held as each to other persons and in this way there could be formed a small nucleus of population which promoted the establishment of the aforesaid wireless station."

In the article of the New Orleans Item, supra, the following statement appears - "Later on [after Colombia had allowed her claim of title to lapse] Honduras claimed the ownership and settled the place with a few families; however, the latter deserted and the island remained

without

without inhabitants and without being claimed by any nation for many years." The statement as to settlement is not commented upon or elaborated in the Honduran Case.

On September 1, 1854, the Honduran Government entered into an agreement with one Augustin Follin, Agent for the Land Company of Honduras, for the purchase of the unappropriated lands of the State, including those on islands. The Case states that "it must be understood that the Santanilla or Swan Islands are included, as being adjacent to the coast of the region described." No further reference to the agreement or acts done thereunder is made.

In a summation of argument the Honduras Case states, (p. 130) that shortly before (1861) the Bay Islands and Mosquito territory were definitively made part of the territory of Honduras the Commandant of Trujillo "performed" jurisdictional acts on the coast of the last named sending a commission to reconnoiter the Santanilla Islands, having been informed that there was a considerable quantity of guano in them, which product he thought of using in order to pay an account of the Government with a commercial firm in Belize."

This statement is elaborated in the body of the argument. (Honduran Case p. 44, et seq.; see also - annex HH.) On March 8, 1861, the Commandant sent a

letter

letter to the firm of the W. Guild and Company of Belize, the creditor firm, in which he stated -

> "I have information that in the Santanillas Islands is found a considerable quantity of guano, and to verify this I am sending a commission to examine them. If this information turns out to be correct that will be another product which I offer, whether at a conventional price or the privilege of collecting it for a fixed period, designating the sum which is to be paid for this privilege."

The Case comments -

> "Whatever may have been the result of the settlement proposed by the Commandant of Trujillo, it shows that the said Commandant exercised jurisdiction over the Islands of Santanilla or Swan Island, by his proposing it with the authorization of the Government."

Seemingly no cognizance was taken by the Honduran Government of the exploitation of the Guano deposits by American citizens or companies under the Secretary's certificate of 1863, or prior thereto. This statement finds inferential support in a letter dated October 3, 1868, (Serrana Folder - Guano Islands papers) from one J. W. Jennett to Mr. Seward, Secretary of State, in which receipt was acknowledged of the Secretary's letter of September 14, 1868. The Secretary stated that the Minister President of Nicaragua and Honduras had protested Jewett's claim to the Serrana banks and keys on the ground that they were "within the jurisdiction of and occupied by that Government". Jewett maintained that that government had

not occupied them since 1857 and that the islands were not within the jurisdiction of any government, being 175 miles from the nearest land, Cape Gracias a Dios. He added that his claim was sounder than those to Navassa, Sombrero, and Swan Islands "all of which is or have been protected by the United States Government, and worked by its citizens."

On May 28, 1888 the Honduran Government granted to Jacabo Baiz "permission for the period of ten years to mine, sell and export guano, phosphate or any other fertilizing substance found on the islands, islets, and keys of the Atlantic, belonging to the State." Loaded ships were to sail to the nearest authorized port for shipment. (Honduran Case - p. 109) The Case maintains that Swan Islands, by virtue of being adjacent, were included. Yet, no reference is made to any activities of the concessionaire on Swan Islands.

On October 24, 1894, one A. W. Brash (a person interested in Swan Islands) addressed a letter to the Department (Num. File, V. 191, No. 1804) in which he stated, in part - "I also received a letter sometime ago, from the Honduras Consul in N. Y., informing me that he thought the island was under the jurisdiction of the U.S.".

In 1907 the Inspector General of the Treasury, Monico Zelaya,

Zelaya, being at La Ceita and having been informed by Burke (mentioned above) that the Islands belonged to Honduras planned to visit them for the purpose of posting a guard there. The national steamship which he intended to use required repairs; before the parts arrived he was called to Tegucigalpa "where he spoke of the matter to his superiors, but the latter did not attach to it the importance which it deserved." (Honduran Case - p. 123. See Annex RR. This is a letter bearing the date line "San Francisco, December 14, 1923" and is addressed by Monico Zalaya to Señor F. Bueso, Tegucigalpa).

At this point one should mark the letter of August 4, 1909, from G. L. and H. T. Smith, attorneys for the Swan Island Commercial Company, referred to above in the early part of this section of the memorandum, which mentioned a Honduran claim of jurisdiction.

On page 124 the Honduran Case states -

> "On July 15, 1912, Doctor Antonio Fontecha wrote for General Manuel Bontilla, President of the Republic, for the sedond time, some notes on the Swan Islands and the Cays of Gracias a Dios. In these notes he says that the jurisdiction of Honduras over those Islands was never disputed during the colonial period and that the said jurisdiction passed to the State of Honduras according to the Constitutions of 1824 and 1839, the second of which is more explicit with regard to this matter."

No documentation is provided for this statement. (The Constitution of 1839 uses only a general phrase - see above.)

The

The case adds that at this time the wireless station of the United Fruit Company had been installed on the larger island and comments -

> "If in 1908 the initiative of the Inspector General of the Treasury, Mr. Zelaya, had been given attention, this station would perhaps not have been constructed, or it would have been constructed on different terms, after agreement with the Government.
>
> "This fact and the opening of the Panama Canal brought to view the importance of the Islands; but General Bonilla died on March 21, 1913, without having made any disposition with regard to them."

In the enclosure of the despatch of November 21, 1923, (811.0141 Sw 2/82) the Minister for Foreign Affairs states -

> "Even in 1912 the Government of Honduras was deeply interested in the administration of the Swan Islands but could do nothing in that respect at that time, nevertheless those islands were not outside the realm of law as the Civil Code, the Customs Code, the Police Regulations and the regulations governing control over ports contain provisions relative to permission to disembark only in parts opened for such purpose, and disembarking at other points of the coast incur penalties for those responsible, except in special cases. In this sense disembarking on the aforementioned islands is prohibited."

A despatch from the American Consul at Ceiba, Honduras, (September 22, 1918 - 811.0141 Sw 2/51) makes enquiry as to the status of the islands and states -

> "It is also said that the Government of Honduras makes some claim to it as forming a part of the group known as the 'Bay Islands' off the North Coast. However, it is more than 100 miles from the nearest of these."

The present controversy arose a few years later. A brief history of its genesis has been given above in the Introduction.

On

On June 6, 1929, the Legation at Tegucigalpa transmitted a despatch to the Department (811.0141 Sw 2/125) in which was enclosed an "exposé" on Swan Islands prepared by one Dr. Antonio C. Rivera, a member of the Permanent Commission of Congress; the exposé was approved by the Permanent Commission. He states that the Swan Islands are a part of the Bay Islands and so remained until Adams, by chance, landed in 1892 or 1893, and settled there raising the American flag; that the islands for four hundred years have been recognized as belonging to the colony or Honduras. He proposed that a military force be detailed to the islands and a decree was drafted to this end. (There is no record that it ever was passed in Congress.)

Shortly thereafter, there was favorable and outspoken comment on Rivera's "exposé" and proposal in the editorial columns of the Diario de Honduras, the official "mouthpiece" of the Government. When the Legation called this to the attention of the Foreign Minister the reply was made that the editor had been reprimanded and told that his newspaper "had diverged from the government's view instead of supporting it."

The above statements dispose of the Honduran attitude as manifested directly with reference to the islands. We may not consider the arguments adduced in support of the conclusions reached, the last being - "the flag of Honduras

must

must wave there as the symbol of our sovereignty."

Before these arguments are summarized one contention should be considered. It appears in paragraph 12 of the Conclusion and reads -

> "If the United States tried to defend the Swan Islands as being its own territory, it would not have offered the settlement that is found in the note."

This typical reaction to the proposal made by this Government may serve as a caveat. However, the Honduran statement can be used an an argumentum ad hominem; no more would the Honduran Government have accepted the proposal if its right to defend the islands were unequivocal.

The attempt will now be made to give a brief but accurate summation of the Honduran Case.

The Islands were discovered early in the 16th century, perhaps by Columbus on his way to Cape Gracias a Dios. The islands must have been considered a part of the early Spanish territories and included within the governmental organizations established on the mainland. The Honduran Case, p. 16, states-

> "- - -it is impossible that no landing was made there by the navigators who bestowed on them the name of first, San Millan - - -", etc.

(There is no necessity to trace the growth and extent of the various provinces, districts, or bishoprics which embraced that region on the mainland opposite Swan Islands. For, in no statement regarding their boundaries are the Swan Islands mentioned as included. (But, see the general

cartographic

cartographic descriptions, supra.) It seems established that actual occupation was not made during Spanish rule. The Honduran Secretary of State, in his "Memoria - Relaciones Exteriores", (op. cit., page 21) stated - "Although the islands were not populated under the Spanish Colonial Government, they did not on that account cease to belong to it . ." The Honduran Case, stated, pp. 16-17 -

> "Their depopulation is no argument against this, being explained by the Indian slave trade, as has been indicated above, or because they have been occupied only temporarily for fisheries, for attack or defense, or because they did not inspire much interest in the Spaniards who, masters of the immense lands of the Continent, explored and colonized them in preference to the islands, as they were trying to do precisely in the region of Taguzgalpa, opposite to which they saw, as an integral part thereof, the islands of Santanilla."

The fact that the islands were given an European name indicates, possibly, that they were uninhabited and obscure at the time of discovery. (The Honduran Case misses no opportunity, in discussing the founding of a town or the delimitation of a province, to point out that the Swan Islands are adjacent.) The conclusion is reached that during the 16th century the islands were within "the jurisdictional territory of the Governorship of the Province of Honduras." (Honduran Case, p. 9) The authorities relied upon are found in the "Memoria - Relaciones Exteriores" op. cit. p. 201 et seq. (See also - Honduran Case p. 10).

Emphasis

Emphasis is continually placed on the fact that the islands are so situated that they must necessarily be seen by those following the trade routes to the mainland. Furthermore, the attempt is often made to identify them with the Bay Islands, the nearest of which is over 100 miles away. Thus (Honduran Case - p. 13 et seq.) mention is made of the occupation of Guanaja, Roatan, and Utila (the Bay Islands) by pirates in 1639 and the activities of Santillan, captain of a Spanish man-of-war. The Swan Islands are again described under the name "Santanillana"; following the description this sentence appears - "The Spanish Government, in 1642, ordered the depopulation of the islands." The inference is that "Santanillana" was one of "the islands"; the justification for such a statement is more than doubtful. (The attempt to make Swan Islands a part of the Bay Islands may be readily disposed of by consideration of the treaty, signed November 28, 1859, between Great Britain and Honduras in which Great Britain recognized the sovereignty of Honduras over the "Bay Islands", such islands being identified by name. Swan Islands were not included. Honduran Case, p. 90).

The Spanish rule on the mainland opposite the islands was often threatened and, upon occasion, extinguished. The British and the pirates were the chief aggressors. Thus,

in

in 1699 an Englishman, one William Pitt, settled in Mosquitia on the Rio Tinto (Black River) and acted as Governor of the Mosquito Indians and "it is natural to suppose that he held the adjacent islands subject to his dominion, among them the Santanilla islands." (Honduran Case, p. 19. Later, of course, Honduras was to succeed to whatever rights Great Britain claimed on the Mosquito Coast.)

Seemingly the final Spanish organization of this territory was the Intendency of Comayagua which included (Honduran Case, p. 52) "all the adjacent islands, among them the Islands of Santanilla or Swan Islands - - -". The territory of this Province "became the territory of Honduras when the independence of the Reino of Guatemala, now Central America, was proclaimed. This is the uti posidetis of 1821".

Reference should be made here to the "History of the Kingdom of Guatemala", cited above. In that work the learned author describes the District of Comayagua. The sole mention of islands is a reference to the island of Roatan, a brief statement of its history being given. (p. 57). The author has a later chapter entitled - "Of the Island of Roatan, and others, in the Bay of Honduras". Fourteen islands are specifically named but no reference is made to Swan Islands under any name now of record. It is stated that at the time of the conquest all the islands mentioned were inhabited but only three (Roatan, Guanaja, and Utila)

remained

remained so after the activities of the Spaniards and pirates. (p. 318).

On July 1, 1823, Central America declared itself a sovereign, independent nation. "In this memorable Act nothing is said with respect to territory." (Honduran Case p. 53) The Constitution adopted by the Central American Congress in 1824 provided, in Article V - "The territory of the Republic is the same as was formerly included in the Realm of Guatemala, except the Province of Chiapas". (Honduran Case, p. 55) The Constitution of the Province of Honduras provided that its territory "includes all that belongs and has always belonged to the Bishopric of Honduras." (Ibid). When Honduras became a State it retained the territory it possessed as a Province. (Honduran Case - p. 57). Its constitution referred to "islands adjacent to its coasts." Later constitutions, containing a similar phrase, have been noted above.

The Case devotes much effort and space to the controversies with Great Britain over the Mosquito Coast and the Bay Islands. This discussion is of doubtful value since there is no indication that the Swan Islands were involved. The sole purpose which it can serve is to eliminate Great Britain as a possible claimant to territory now admittedly under the sovereignty of Honduras. When possession was taken

of

of the Bay Islands by Honduras, after agreement with Great Britain, no mentioned was made of Swan Islands, so far as the Honduran Case shows.

On March 5, 1872, the Honduran Congress "dictated a decree" constituting Mosquitia a department of the government, its boundaries to be designated after acquisition of scientific data. They were roughly described - "there shall be on the east Cape Gracias a Dios, on the west the river Aquán; on the north the Atlantic Ocean and its adjacent islands; - - -". (Honduran Case, p. 103). No record of exact demarcation or the meaning of the phrase "adjacent islands" is referred to.

The first reference to American occupation involves the settlement made by Alonzo Adams in 1893. (According to our records even this reference is inaccurate. The Honduran Case shows an almost unbelievable ignorance on the part of the Honduran Government concerning activities on Swan Island even at the time of Walker's Expedition and particularly later). The occupation of Adams, even without molestation, "could not change the nationality of the islands - - -"; "- - -the Islands form an integral part of our territory according to our constitutions and laws." (Honduran Case, p. 122) The status of the United Fruit Company is of no greater value or significance than that of Adams. (Obviously, the Honduran Case is sound in its attack on the theory that

Adams

Adams discovered the islands in 1893.)

The recent history of the islands, in diplomatic correspondence, has been set out in the introduction. The above statements, coupled with the conclusion of the Case, provide the skeleton of the Honduran argument. In the note of the Honduran Secretary of State, transmitting the Honduran Case (enclosure to despatch from Legation at Tegucigalpa - November 21, 1923, 811.0141 Sw 2/82) he stated that his "Government is most kindly disposed to sign a treaty or convention with the Government of the United States concerning the islands, in which it will be possible to make reasonable concessions in favor of the aforementioned radio telegraphic station and American citizens who may desire to pursue activities there in commerce, agriculture or any other kind of industry."

B. UNITED STATES

1. History of the Islands under occupation by American citizens.

An attempt will now be made to summarize material available in the Department's files bearing on the occupation of the Islands by American citizens. One making an investigation in the archives of the Department is handicapped by the peculiarly inefficient system of indexing in force until about 1906. For this reason no definite

assertion

assertion can be made that the following material is complete in all respects. Furthermore, even casual examination will reveal that certain documentary material no longer can be found in the files; in the case of certain documents even a conjecture can not be made as to their whereabouts. For example in a letter to one A. R. Torrey under date of November 19, 1898, (232. Dom.Let. 608) and in a subsequent letter to one J. C. Jewett under date of February 17, 1899 (235 Dom. Let. 35) a list of documents on file in the Department was given. Many of these documents have not been found. However, it is believed that the material is sufficient to give an accurate picture of the history of the Islands under American occupation.

Before this material is taken up in chronological order reference should be made to three memoranda prepared in the Solicitor's Office. These memoranda contain a rather full description of certain historical and legal aspects of the case. The first bears date April 21, 1914 (811.0141 Sw 2/31); the second, September 16, 1919 (811.0141 Sw 2/61); and the third, August 14, 1924 (811.0141 Sw 2/82 1/2). It is unnecessary, for present purposes, to trace the chain of title in private persons. The memoranda referred to may be used to such end.

On May 15, 1857, one J. W. Fabens addressed a letter to the Department (Misc. Lets.) stating that under the Act of Congress, citizens of the United States may, with the approbation

approbation of the President, take possession of Guano Islands "in the name of the United States"; that he has discovered large quantities of guano in the Caribbean (the Swan Islands are not mentioned); and that he desired to occupy. He asked for information and the record in the Sombrero Islands case.

On May 19, 1857, the same individual addressed a letter to the Department (Misc. Lets.) making inquiry about the necessary bond and expressing the intention to "occupy" certain Islands for the extraction of guano. The attached list of Islands included "Swan Islands". The letter stated - "the Guano deposits in and upon the Islands described in the above list were discovered by the undersigned in person or by his regularly employed agents during his residence as United States Consul at Cayenne, French Guiana, from 1846 to 1849, and during his subsequent residence as United States Commercial Agent at San Juan in Nicaragua on the Caribbean Sea."

On June 18, 1857, the same individual and one Charles Stearns (from the office of the Atlantic and Pacific Guano Co.) addressed a letter (Misc. Lets.) to the Department requesting information as to the bond and asking that a national vessel be sent to the Swan Islands for soundings, etc. Two affidavits were inclosed; they were executed by George W. White, shipmaster, and Samuel E. Stearns and were

"relative

"relative to discoveries of guano deposits upon two islands in the Caribbean Sea." (I have been unable to find these affidavits but reference is made to them in a draft memorandum in the Swan Islands file under date of March 3, 1924.) The affidavit of White was executed on June 16, 1857. It stated, in part, that he " - - -took possession of the same [uninhabited islands] in the name of the United States according to the provisions of the Act of Congress relating to guano discoveries; - - -". The affidavit of Samuel E. Stearns, executed June 17, 1857, stated that he accompanied White and that the Island was uninhabited. It recited - " - - -there was no evidence of the Island having been previously occupied and there was no human being upon it at the time of the landing; and that no guano had previously been taken from the Island; and that Captain White took possession of the Island in the name of the United States."

On June 24, 1857, the Acting Secretary of State wrote to the President (Report Book - No. 7, p. 381) transmitting the papers in the case of Messrs. Duff Green, F. W. Fabens, and C. Stearns, "who claimed to be discovers [sic], or assignees of the discoverers, of guano deposits upon two islands in the Caribbean Sea." The letter further stated - "The Islands referred to are doubtless those known to the maps as "Santanilla" or Swan Islands - - -. The claim is that Captain White discovered guano on them, took possession

of

of them in the name of the United States, and has so far complied with the provisions of the Act of August, 1856, as to justify the President in declaring them the property of the United States." It was further recited that the affidavits showed, inter alia, "- 3. That the Islands was unoccupied and there was no evidence of its previous occupation or of any removal of guano from it." The letter concluded - "since there is no reason to doubt the credibility of the affidavits - the case seems to be sufficiently made out to bring it within the discretion of the President."

On June 29, 1857, Secretary of State Cass wrote to Fabens and Stearns (45 Dom. Lets. 157) answering their letter making inquiry as to the form of bond, etc., and stating -

> "The Act of Congress of August 18, 1856, (P.L. 110) confers a discretionary power on the President of the United States to decide whether an Island which has not been appropriated by any other nation, and on which Guano has been discovered shall 'be considered as appertaining to the United States', and whether he shall 'employ the land and naval forces of the United States to protect the rights' of the discoverer of such an Island. This is manifestly a grave and important duty to be performed by the President only after all the prerequisites of the law shall have been complied with. Whether these have been fulfilled, especially in regard to occupation and possession after the discovery, it is not now necessary to inquire.
>
> "The sole and exclusive object of the Act, as written upon its face, is to furnish citizens or residents of the United States a supply of guano, at a reasonable price. Before the President, in his discretion, ought to appropriate any such islands to the United States — he ought at least to be satisfied that there is a sufficient quantity of Guano upon it to justify the measure and that this is of a good quality."

On

On April 26, 1858, Fabens (Atlantic and Pacific Guano Company) wrote to the Department (Misc. Lets.), in response to the Department's letter of June 29, 1857, which required further evidence of occupation and possession. He enclosed the reports of agents and an affidavit of one Hart, an employee, who visited the Island and reported on the guano deposits. (These documents have not been found). The fact was stated that in the early part of 1858, 12 men were employed, under an agent, in the removal of guano.

On October 2, 1858, Fabens (Atlantic and Pacific Guano Co.) wrote a letter to the Department (Misc. Lets). referring to previous correspondence and enclosing affidavits some of which refer "to the discovery of guano upon the Swan Islands". (These affidavits have not been found). On March 7, 1859, the Department wrote to one Albert D. Walker, of the Atlantic and Pacific Guano Company (51 Dom. Let. 115) stating that the Department had been informed by Lord Napier, the British Minister, that the superintendent of British Honduras had learned of the abandonment of American guano diggers on the Swan Islands, "off that coast"; that since there was no American Consul at Belize the superintendent, on his own responsibility, had engaged a schooner and effected the rescue of these men, employed by the Atlantic and Pacific Guano Company.

Reimbursement

Reimbursement was suggested. A copy of this letter was transmitted to Fabens, President of the Atlantic and Pacific Guano Company by letter of August 15, 1859 (51 Dom.Let. 18).

In a file entitled "Miscellaneous papers relating to Guano Islands" (draftsman, purpose, and origin unknown -- probable date, 1859) there is a document entitled - "Report and General List of Islands said to contain deposits of Guano, which are claimed as discoveries under the Act of 1856, by Citizens of the United States." Swan Island was included in this list. There is a short descriptive statement as follows -

> "Swan Island Lat. 17°, 24' N. Long. 83°, 53' West about 4 miles long, two miles wide - affidavits of discovery - June 18, 1857 by Capt. Geo. Valentine White U. S. Citizen and Shipmaster and by Samuel E. Stearns (corroborative). The Deponents assign their interests to Duff Green, J. W. Fabens and associates, constituting the Atlantic and Pacific Guano Co. Eleazar R. Hart deposes that the Island was in peaceable possession of the company when he landed in 26 Feb. 1858, and when he came away 19th March twelve men remained in possession, preparing Guano for vessels expected."

On February 11, 1863, the Secretary of State wrote to one Baldwin (59 Dom.Let. 373) acknowledging receipt of his letter of February 10, 1863 (not found) relative to the claim of the New York Guano Company to Guano on Swan Islands; a certificate was transmitted.

A copy in the Department's files reads -

"To all to whom these presents shall come, Greeting:

I certify that the New York Guano Company

have

have filed in this Department satisfactory proof of their claim to the guano on great and little Swan Islands in the Caribbean Sea as the assignees of the original discoverers; have filed the bond, and taken the steps required by the Act of Congress of 18th of August, 1856, entitled 'An Act to authorize protection to be given to citizens of the United States who may discover deposits of guano!

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Department of State to be affixed at Washington this 11th day of February in the year of our Lord eighteen hundred sixty-three." (Memo - Solicitor's Office - August 14, 1924 - 811.0141 Sw 2/82 1/2).

The bond of the New York Guano Company may now be found in a file in the Office of the Historical Adviser, office of the Geographer. This bond was transmittedto the Comptroller of the Treasury by the Secretary of State in a letter under date of February 11, 1863. The first "whereas" in the bond recites -

"Whereas Joseph W. Fabens a citizen of the City and State of New York has discovered a deposit of Guano on the Islands in the Caribbean Sea, called Great and Little Swan Islands, not being within the lawful jurisdiction of any other government than the United States of America, and not being occupied by the citizens of any other Government, and has in the name of the United States of America, taken peaceable possession of the same and occupied the same; - -".

On March 23, 1863, the Department wrote to one M. P. Parish (60 Dom.Let. 68) answering inquiries as to evidence in the Department relative to the quantity and quality of guano on the Swan Islands. It was stated -

"It is proper to say that while these proofs were considered sufficient to authorize the Government to extend the protection asked for, under the

Act

Act of August 18, 1856, the Department is, in no wise, responsible for their truth and correctness. There is no evidence in this Department of any adverse claim, to that of the New York Guano Company to the island in question."

The Treasury Department prepared a circular under date of August 23, 1867 - "relative to the Guano Islands appertaining to the United States." This circular was addressed to Collectors of Customs to inform them of the Islands subject to the laws relating to the coasting trade. The following notation appears in the circular - "Great and Little Swan, lat. - (Caribbean Sea).

Certificate for which has been issued to the New York Guano Company, New York."

On January 7, 1869, a list of the Guano Islands was transmitted by the Treasury Department to the Department of State, notation of errors and omissions to be noted. The Swan Islands appeared on the list. (See Misc. papers relating to Guano Islands - Office of the Historical Adviser - Office of the Geographer). (This list appeared under date of February 12, 1869, as circular No. 1 - "Relative to the Guano Islands appertaining to the United States). In a letter of February 9, 1869, - (80 Dom. Let. 262) the Secretary of State informed the Secretary of the Treasury that save for information on Serrano Keys the Department had "no other addition to suggest to the list of Guano Islands" prepared by the Treasury Department.

On November 30, 1895, the Department wrote to

Henry D.

Henry D. Callender (Dom. Let. 244) acknowledging his letter of "20th instant" (not found, seemingly Callender asked for a certificate); he was informed that such were no longer issued and that it was impossible to tell whether a draft in the files was identic with the certificate issued to Baldwin in 1863. Willingness was expressed to certify a copy of that draft "as purporting to be a recognition of the fact that the New York Guano Company had filed here satisfactory proof of their claim to the guano on Great and Little Swan Islands."

In 1896, the Committee on Commerce of the Senate of the United States had before it a bill for the establishment of a lighthouse on Swan Island, "belonging to the United States". The Committee's report may be found in Senate Reports, No. 606, 54th C., 1st S. In this Report it was stated, page 215 -

> "The Swan Islands are Guano islands and as such were the first Islands taken possession of by citizens of the United States after the passage and under the provisions of the Act of Congress in relation to such Islands, enacted in 1856. The United States, through Mr. Seward, the then Secretary of State, proclaimed in February 1863, that those Islands were under the protection of the United States. In the technical phrase of the Act they are 'islands appertaining to the UnitedStates'; and they have, for forty years, been owned and continuously inhabited and operated by citizens of the United States. They are now owned by Mr. Warren K. Blodgett, of Boston, Mass. - - -.
>
> "There

"There is no complication in regard to the Government of the Islands, such as might exist in the case of the larger and more populous islands. There are no inhabitants. The island is occupied by four or five inhabitants of Massachusetts and Connecticut, whose families are still living here; negro labor is brought, during the working season, from other Islands, and sent back when the season is done".

On February 13, 1904, G. L. and H. T. Smith, attorneys for Adams wrote to the Department asking if it would receive proof under the Guano Act. The Department answered that it would do so but without prejudice to prior claims, adding "this Department would be called upon to consider only the question whether the Islands belonged to a foreign government, in case such government should make a claim to it." Adams sent notes and proof on April 14, 1904. (Memorandum of October 24, 1907 - Num. File, Vol. 191 - No. 1804; also Solicitor's Opinions - 1907, Pt. II, p. 808).

A volume entitled "Sailing Directions of the Caribbean Sea" was issued by the Hydrographic Office in 1907 (No. 64, Vol. II, 5th Ed.). On page 330 it is stated "there is a settlement on the western Island ---- occupied by an American company named the Pacific Guano Company. In the dry season 60 men are constantly employed, the export of phosphate averaging 10,000 tons".

On August 10, 1909, the Department of Commerce and Labor wrote a letter to the Department of State (Num. File -

Vol.

Vol. 191, No. 1804/17) in which was quoted a telegram of the State Department of August 4, 1909, as follows:

> "From information before Department it appears Swan Island no longer exploited for guano but it used for raising fruit. R.S. 5578 contemplates abandonment of guano islands by United States after guano has been removed. Department therefore unable to authorize clearance of American Schooner 'Independence Second' coastwise to Swan Island Caribbean Sea."

An enclosure was a letter from the Collector of Customs of Mobile in which he stated that Alonzo Adams, had, in person, given the following information. In 1904, he was working for the Albion Chemical and Export Company on the Swan Islands. He was ordered to abandon the Islands and did so, but returned the next day and "settled the Islands in his own name as an American citizen, raising the American Flag." In March 1904, acting under Sections 5570 and 5578, R. S. U. S. Mr. Adams filed a petition with the Secretary of State as discoverer or settler of these Guano Islands. Since then he has been operating them as Guano Islands. During the week of July 27, 1909, he deeded the Islands to the Swan Island Commercial Company. He claims that he had been given authority by the Bureau of Navigation to trade coastwise to the Islands with American vessels and that he had brought tobacco into Key West from the Islands free of duty under authority of the Secretary.

In February, 1908, the Department was not advised as

to

to the extraction of guano on the islands in compliance with the Guano Act. (Memo - Solicitors Office - April 21, 1914 - 811.0141 Sw 2/31 - p. 4).

In 1908 the American Consul at Port Limon advised the Department of the completion, by the United Fruit Company, of a radio station on the islands. (Ibid).

On August 4, 1909, G. L. and H. T. Smith, attorneys for the Swan Island Commercial Company, wrote the Department asking for protection, notice having been received that the Honduran Government intended to send a war-ship to the islands. The Department replied, on September 21, 1909, that the whole status of the company was being carefully considered. (Ibid).

On September 25, 1909, this Department informed the Treasury Department (in reply to a request as to whether the islands were a part of the territory of the United States) that it was awaiting the production of evidence by the company alleging ownership of the islands to the end that it might be determined whether protection under the Guano Act should be given. At this time an attorney was in consultation with the officers of the Departments of State and Treasury with respect to this evidence and a bond. Such evidence was not produced. (Ibid. p. 5 et seq.)

In

In a memorandum of the Solicitor's Office under date of April 21, 1914 (811.0141 Sw 2/31) reference is made, page 3, to an affidavit of Adams dated March 14, 1904, in which it was alleged:

> "I had been employed by the Albion Chemical Export Company of Boston to live upon the islands and manage their business at that point and I remained in that employment until February 5, 1904; I was then notified by said company to abandon said islands, to discharge all of the other employees of said company and to move from the islands. I at once resigned my position with said company, both leaving the islands and taking with me all of the other inhabitants, leaving the islands wholly unoccupied and unclaimed. And on the sixth day of February, 1904, I returned to the islands again and took possession thereof, the same being at that time wholly unoccupied and unclaimed by any person, and since that time I have occupied the islands in my own right and at my own expense. I therefore respectfully insist that I am entitled to the protection of the United States Government under the terms of Section 5570-5578 of the Revised Statutes of the United States and respectfully pray for such protection."

On November 13, 1911, the Navy Department transmitted to the Department of State (811.0141 Sw 2/29) an official report made to the Navy Department under date of November 2, 1911. In this report it was stated: The inhabitants of the Islands consisted of the foreman, a British negro, of the Swan Islands Commercial Company, five negroes, all British subjects, and two Americans, engineer and operator of the United Fruit Company's wireless station. One W. Cole Adams, son of Alonzo Adams, and manager of the Swan Islands Commercial Company, had lived there and occasionally

lives

occasionally lives there for periods of two or three months, with his family. The American flag is hoisted over the Islands and the United States is believed to have jurisdiction. No guano operations are being carried on and there had been none for several years. Probably operations will not be resumed. Cocoanut groves have been planted and shipments of satinwood are made. No political organization existed on the Island.

In a letter from the Department of Agriculture to this department under date of December 10, 1927, (811.0141 Sw 2/93) it was stated that the Weather Bureau had established an official station on the islands in June, 1914, and had maintained it until August, 1927, when the Tropical Wireless Station was moved away.

The Central American and Mexico Pilot east coast, published by the Hydrographic Office (H.O. No. 130, 1927) states that in 1920 five Americans and 14 Caymanians were living on the Islands. It is further stated that "guano was formerly shipped from the Islands, but the deposits have been exhausted."

2. Contention of the United States, as diplomatically presented.

There is little that can be added to the statements in the Introduction since this Government has not

presented

presented a detailed exposition of its assertion of sovereignty. However, the Department made the following positive statement in a telegram to the American Legation at Tegucigalpa under date of March 1, 1929 (811.014 Sw 2/117) in response to a telegram from the Legation informing it of the possible intent of the Honduran Congress to place an armed guard on Swan Islands -

> "Upon verification of present reports you are requested to address to the Minister for Foreign Affairs a note stating that under the terms of an Act of Congress of the 18th of August 1856, the Dominion of the United States Government was extended over the Swan Islands, February 11, 1863, and that the sovereignty of the United States attached to those Islands as of that date - - -.
>
> "You will add that in view of these facts this Government hopes that the Government of Honduras will refrain from the performance of any act of assumption of jurisdiction over the Islands in question."

This instruction was carried out.

It is apparent from this instruction and from the material set out in the Introduction that the United States has based its case, diplomatically, on discovery and occupation and the exploitation of the Islands under the Guano Act. In a subsequent section of this memorandum an attempt will be made to trace the position of the Department, with respect to sovereignty over Swan Islands, from the date of earliest occupation of the Islands to the present time. Other official pronouncements in this connection will be included.

IV.

THE GUANO ACT OF 1856.

A. Generally Considered.

This act became effective as of August 18, 1856, (11 Stat. 119) and was later carried under sections 5570-5578, Revised Statutes. It may now be found under Title 48, United States Code, sections 1411-1419. For convenience of reference the Act is copied in its entirety.

> "Section 1411. Guano districts; claim by United States.--Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States. (R.S. § 5570.)
>
> "1412. Same; notice of discovery, and proofs.--The discoverer shall, as soon as practicable, give notice, verified by affidavit, to the Department of State, of such discovery, occupation, and possession describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government, before the same shall be considered as appertaining to the United States. (R.S. § 5571).
>
> "1413. Completion of proof on death of discoverer. - If the discoverer dies before perfecting proof of discovery or fully complying with the provisions of section 1412 of this title, his widow, heir, executor, or administrator, shall be entitled to the benefits of such discovery, upon complying

with

complying with the provisions of this chapter. Nothing herein shall be held to impair any rights of discovery or any assignment by a discoverer recognized prior to April 2, 1872, by the United States (R.S. § 5572).

"1414. Exclusive privileges of discoverer.—The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding $8 per ton for the best quality, or $4 for every ton taken while in its native place of deposit. (R.S. § 5573).

"1415. Restrictions upon exportation.—No guano shall be taken from any island, rock, or key mentioned in section 1411 of this title, except for the use of the citizens of the United States, for the purpose of being used therein, and to none others, and at the price prescribed, and to provide all necessary facilities for that purpose within a time to be fixed in the bond; and any breach of the provisions thereof shall be deemed a forfeiture of all rights accruing under and by virtue of this chapter. (R.S. § 5574.)

"1416. Regulation of trade.—The introduction of guano from such islands, rocks, or keys shall be regulated as in the coasting trade between different parts of the United States, and the same laws shall govern the vessels concerned therein. (R.S. § 5575.)

"1417. Criminal jurisdiction.—All acts done, and offenses or crimes committed, on any Island, rock, or key mentioned in section 1411 of this title, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States; and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws for the purpose aforesaid are

extended

extended over such islands, rocks, and keys. (R.S. § 5576.)

"1418. Employment of land and naval forces in protection of rights. -- The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns. (R.S. § 5577.)

"1419. Right to abandon islands. -- Nothing in this chapter contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys, after the guano shall have been removed from the same." (R.S. § 5578.)

Shortly after the passage of the above act the Secretary of State wrote to the Attorney General (May 25, 1857 - 45 Dom.Let. 52) asking for an opinion on the act. There was no reference to the question of sovereignty or the exercise thereof.

The opinion requested was duly rendered on June 2, 1857 (9 Ops. 30). The Attorney General said -

"The President may consider an island as appertaining to the United States, and protect it accordingly, upon the following facts being established:

1. That a deposit of guano has been discovered upon it by an American citizen.
2. That it is not within the lawful jurisdiction of any other government.
3. That it is not occupied by the citizens of any other government.
4. That the discoverer has taken and kept peaceable possession thereof in the name of the United States.
5. That the discoverer has given notice of these facts as soon as practicable to the State Department, on his oath.
6. That the notice has been accompanied with a description of the island, its latitude and longitude.
7. That satisfactory evidence has been furnished to the State Department showing that the island was not taken out of the possession of any other government or people.

"After

"After the President shall be satisfied on these points, and shall thereupon decide to treat the island as an appurtenance of the United States, he may allow the discoverer or his assigns to keep exclusive possession for the purpose of taking off the guano and selling it. But before this exclusive right can be given to the discoverer, he must give bond to the United States, with good sureties, and in a sufficient penalty, conditioned that he will sell guano to no one but residents of the United States, and to them only for the purpose of being used in this country; that he will sell it at a price not exceeding the maximum allowed by the act of Congress; that he will provide all needful facilities for getting the guano off within a certain time; that he will give up his possession whenever his right to hold it shall be lawfully terminated; and, generally, that he will obey the laws of the United States on the subject. I have given, not the form of bond, but the substance of what it ought to contain.

"The discoverer will then hold the island "at the pleasure of Congress". (Act 18th August 1856, sec.; 11 Stat. at Large, 119.) This phrase means that Congress may terminate the possession when it pleases. If it could be construed as a condition precedent, so as to make it necessary that another act of Congress must be passed to authorize the taking of possession, this act would be nugatory altogether. It is not to be presumed that any legislative body would pass a law covering the whole class of cases, and then forbid that it shall go into operation without another law for each particular case. General regulations are made for the very purpose of saving the necessity which would otherwise exist of having each individual's rights or duties specially prescribed. There is nothing to contravene this general principle, even in the form of expression here used. It is technically accurate to call one a tenant at will who holds an estate liable to be terminated whenever his landlord sees fit. Under this act, the discoverer of a guano island is the nation's tenant at will, and that will (or pleasure, which signifies the same thing) is to be expressed by Congress whenever the nation may desire to put an end to the estate granted.

"The President is not bound, against his own conviction of public policy, to declare any particular island as appertaining to the United States. The law forbids him to do so before the prerequisites above mentioned are complied with, and leaves it to his discretion afterwards. But he may do it without waiting for an adverse claim to be set up."

In

In 1859 the Attorney General was called upon to render an opinion as to whether or not an American citizen should be protected in the exploitation of guano on Cayo Verde, an island claimed by Great Britain. He said (9 Ops. 406) -

> "In the present case Cayo Verde is distinctly asserted by the British Government to be within its jurisdiction. The President has no right under the law to annex the island to the United States, or to put any American citizen in possession of it, until the diplomatic question raised by the British minister shall be finally settled, and not then unless it be settled in our favor."

As a result, doubtless, of these opinions, Lewis Cass, Secretary of State, prepared, October 5, 1860, a document entitled "Facts to be established to enable the President to exercise the power conferred by the Act of Congress of August 18, 1856, relative to Guano Islands". Paragraph 7 thereof laid down the requirement -

> "That satisfactory evidence has been furnished to the State Department showing that the island was not taken out of the possession of any other Government or people."

The certificate (supra) issued to the New York Guano Co. made no specific mention of occupation and possession. However, in the Johnson's Island Guano folder (Office of the Historical Adviser - Archives) there is a document which appears to be a certificate issued to the Pacific Guano Co., discoverer of guano on Johnson's Islands. This document recites that the Company gave - "the required notice of the discovery of guano on and of the occupation of Johnson's Islands, in the Pacific Ocean, in the name of the

United

United States of America - - -". It may have been customary to make such reference to occupation in the name of the United States. (See certificate relating to Navassa Island - set out in the case of Jones v. United States, 137 U.S. 202, at 206). The Act (U.S.C. § 1412) and the opinion of the Attorney General (9 Op.s 30) speak of the giving of notice that possession has been taken in the name of the United States.

It may be of value to quote again from a letter of Secretary of State Cass to Fabens and Stearns. (June 29, 1857 - 45 Dom.Let. 157).

> "The Act of Congress of August 18, 1856, (P.L. 110) confers a discretionary power on the President of the United States to decide whether an Island which has not been appropriated by any other nation, and on which Guano has been discovered shall 'be considered as appertaining to the United States', and whether he shall 'employ the land and naval forces of the United States to protect the rights' of the discoverer of such an Island. This is manifestly a grave and important duty to be performed by the President only after all the prerequisites of the law shall have been complied with. Whether these have been fulfilled, especially in regard to occupation and possession after the discovery, it is not now necessary to inquire.
>
> "The sole and exclusive object of the Act, as written upon its face, is to furnish citizens or residents of the UnitedStates a supply of guano at a reasonable price. Before the President, in his discretion, ought to appropriate any such island to the United States — he ought at least to be satisfied that there is a sufficient quantity of Guano upon it to justify the measure and that this is of a good quality."

Substantially

Substantially the same statements were made by Cass, Secretary of State, to Messrs. Wood and Grant in a letter dated July 1, 1857 (47 Dom.Let.166). One sentence reads - "Before assuming, therefore, the grave responsibility involved in declaring a guano island to belong to the United States, he [the President] must be satisfied that the guano found upon it is in sufficient quantity and quality to justify the measure."

This statement ought be read in conjunction with a recent statement made in a letter from the Department to Henry Cabot Lodge, under date of August 26, 1922, (811.0141 Sw 2/77):

> "In so far as the Guano Islands Act is concerned, I may state that it has never been authoritatively determined that the United States claims any sovereignty or territorial rights over Guano Islands, which appertain to the United States, other than that necessarily exercised in the protection of American citizens, who are engaged in the removal of guano therefrom".

It is difficult to determine the exact legal significance of acts performed under the Guano Act. A reading of the debates in the Senate prior to the passage of the act (Congressional Globe - 34th C. 1st-2nd S, 1856) demonstrates that the primary purpose of the act was to facilitate the exploitation and carriage of guano to the United States, for the benefit of agricultural interests. This end gained no one seemed to have much concern over the exact legal status of guano islands during exploitation,

or

, or thereafter. However, some discussion did center around this phase of the question. The original bill, as amended by the Committee on Foreign Relations, provided, in Section 1, that guano islands may

> "at the discretion of the President of the United States, be considered as appertaining to the United States for the use and behoof of the discoverer or discoverers, and his or their assigns, and may, at like discretion, be taken possession of in the name of the United States with all necessary formalities.

Section 4 provided -

> "That nothing in this act contained shall be construed obligatory on the United States to retain possession of the islands or territory as aforesaid, for the said discoverer or discoverers, or assigns, or for the United States, after the guano shall have been removed from the same."

Thus the bill drew a clear distinction between a possession for the discoverers and a possession for the United States. An amendment was offered in virtually the same form as that of the present Act. (Ibid, pp. 1696-1697).

Mr. Clayton said -

> "I think there is nothing in the bill which obliges this Government to assume other duties than those which are devolved on it by the general principles of international law. I take it for granted that the Government is bound to take proper care of these discoveries. This bill carries out what I suppose to be the general principle of law, and explains to the people of the country the duties of the Government whenever any one of these islands shall be discovered; and, as far as I am able to understand it, it does not go at all beyond the general law on the subject." (Ibid, p. 1697).

Hale

Hale of New Hampshire asked why there need be legislation for guano islands since rights of discovery of undiscovered lands are determined by the Law of Nations and since the Government would enforce the rights of discovery of its citizens. Clayton, of Delaware, made answer that the Government was not so obligated; seemingly his idea was that the proposed Act would impose such obligation. (Ibid - p. 1097).

Seward, who proposed the bill, explained the object which he had in view. Peru had a virtual monopoly on guano; the price was too high. The act was designed to encourage American citizens "to seek out, and to appropriate to the uses of the United States, under the authority of law, other deposits than those of the State of Peru". He added - "It is probably true that the discovery would inure, when made by a citizen of the United States, to the government for the benefit of the whole people; but a discovery which inures to the benefit of the whole people of the United States brings upon all the people of the United States the responsibility of making it practicable and available." Seemingly he did not anticipate a case arising which would involve the question of sovereignty. For, he said (ibid - p. 1698) "If there was any such thing as a prospect of dominion to be secured to the United States resulting from

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the discovery and occupation of these islands, it would be a subject for some jealousy, but the bill is framed so as to embrace only these more ragged rocks, which are covered with this deposit in the ocean, which are fit for no dominion, or for anything else, except for the guano which is found upon them. There is no temptation whatever for the abuse of authority by the establishment of colonies or any other form of permanent occupation there. - - -The bill itself then provides that whenever the Guano should be exhausted, or cease to be found on the islands, they should revert and relapse out of the jurisdiction of the United States."

The bill carried the clause that within the President's discretion an island should be considered "as appertaining to the United States for the use and behoof of the discoverer or discoverers - - -". Fessenden moved to strike out the words "for the use and behoof - - -", saying (ibid, p. 1740) - "The United States ought not to hold an island of this kind when discovered for the use and behoof of anybody. They hold it as their own, but in consideration of the discovery and certain things to be done, they grant the exclusive right to use it to particular persons." Answer was made by Mason - "These guano islands, it is well understood, have no value in the world except for the deposit on them — what has been

put

put there by the birds. The bill provides that, when the deposit is removed, if it ever shall be, the title of the United States shall cease, and the island be abandoned; - -" (Ibid, p. 1740) Fessenden contimued - "We do not mean - certainly I do not desire that the idea shall be conveyed by this bill, to take possession of these islands for the use of anybody but the people of the United States, just as any other Government takes possession of an unknown country for the benefit of its people. I do not wish the idea held out that these parties acquire any rights in consequence of our Government taking possession". The amendment was agreed to (Ibid, p. 1740). The bill passed after a discussion of costs and prices. Seemingly there was no discussion in the House.

It is difficult to account for the confusion which attended the discussion of the act, prior to passage, and has attended administrative action subsequent thereto. The absence of a clearly defined position is attributable, perhaps, to the idea, and in some cases, fact, that guano islands are barren outcroppings of rock in the ocean, possessing no value save their deposits.

In 1873 the question of a certain person's right to deposits on a Pacific guano island came before the Attorney General. In the course of his opinion the Attorney General said (14 Ops. 608 at 610) -

"Upon

"Upon application at the office of the Secretary of State I am told that it has been the course of that Department to recognize such islands only while occupied for the purposes of procuring guano, and therefore, upon a cessation of such occupancy, they become open again to discovery, possession, etc."

Inferentially, one gathers that upon cessation of the exploitation of guano the islands are permitted to revert to their former unclaimed status.

In 1879 the status of Christmas Island, in the Pacific, came in issue between the United States and Great Britain. The guano deposits were discovered by American citizens and exploited under a certificate of this Government. It appears that formal possession was taken in 1872 by the United States Ship NARRAGANSETT. The British Government professed some claim to the island; on January 29, 1879, the British Minister addressed a note to the Secretary of State asking "whether the Government of the United States has finally abandoned and withdrawn its claim to the island in question". In reply (April 1, 1879) Secretary of State Evarts traced the history of the islands under American occupation and concluded -

"There being no other papers touching the question of ownership to the guano deposits on said island than those mentioned above, and no notification that said company have abandned the island on file in the Department, they are still considered to be entitled to the protection guaranteed by the laws of the United States in their possessary right, so far as such occupation may be necessary to secure the company or its assigns the deposits of guano found thereon."

Thus

Thus, no absolute assertion of sovereignty was made despite the formal taking of possession. Later a British man-of-war took possession of the island (then not occupied) on behalf of the British Government. The American Minister was instructed to call the above letters to the attention of the British government and "to reserve all other questions which may grow out of the reported occupation of the island". (For. Rel., 1888, Pt. 1, pp. 712-714; 727-728). Seemingly British annexation was not further disputed.

On December 8, 1904, enquiry was made by the firm of Howson and Howson as to the protection of patent rights on Christmas Island. A reply has not been found although one is noted. However, there does appear a draft reply (Dec. 28, 1904) in which it was stated -

> "The United States possesses no sovereign or territorial rights over guano islands. It simply protects American citizens who discover guano on an island, or their assigns, in the prosecution of their enterprise which extends only to appropriation and disposal of guano".

(This statement was approved by A. A. Adee - see Christmas Island Folder - Office of the Historical Adviser).

On November 22, 1905, one W. S. Carter wrote the Department, asking if he might purchase Navassa Island from the United States. He was informed that "this Government possesses no territorial sovereignty over the island of Navassa." (Sol.s Op.s, 1907, Pt. II, p. 630).

On the general subject of abandonment of a guano island it has been said - (Oct. 19, 1903 - Gresham to

Gordon

Gordon, 194 Misc. Lets. 57) -

> "As to whether the non-use of the privilege of working the guano causes a forfeiture thereof, the law is silent upon the subject, and the Department has never prescribed any method of procedure in such case. The Department has never attempted to determine what constitutes abandonment of a guano island, and it seems probable that this question should be decided by the courts, the case arising." (Sols. Ops. 1907, Pt. II, p. 631).

In 1911 there arose the question of making Navassa Island a light-house reservation. On July 1, 1911, (?) the Attorney General wrote the Secretary of Commerce and Labor, in part, as follows:

> "There is nothing in the Act of Congress of August 18, 1856, from which it can be said that it was intended by said act to recognize title in the discoverer or to assume on behalf of his government complete title, but on the contrary, it is clear that the Act meant only to protect the discoverer for the purpose of obtaining and shipping guano and that the Guano Islands 'were in no sense to become part of the territorial domain of the United States'. - - -
>
> "However, one of the citizens of this Government discovered the Island of Navassa and its guano deposits and took actual possession, not merely symbolical possession, by planting a flag or erecting tablets with inscriptions thereon or the like, and he and his assigns have since maintained that possession, and it does not appear that the quasi title or jurisdiction assumed by the United States has at any time been abandoned. The said island is still one of the Guano Islands belonging to this country and further the language of Section four of said act suggests that this Government may retain possession after the guano shall have been removed from the island, although it may abandon it shall Congress see fit to do so. - -

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> "The island is now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other government, and it is recognized and considered as pertaining to the United States, though not a part of its territorial domain.
>
> "Should Congress, therefore, authorize the erection of a light-house on Navassa Island, such action in authorizing the erection of the lighthouse and making an appropriation for the expenses of the same, would be complete and sufficient". (Sols. Ops. - 1917, Pt. II, p. 673).

In consequence the President issued a Proclamation, dated January 17, 1916, reserving Navassa Island for light-house purposes. This proclamation recited that the island "is now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other Government"; that Congress had appropriated money for the construction of a lighthouse on the island; and that the reservation was deemed necessary "in the public interests, subject to such legislative action as the Congress of the United States may take with respect thereto." (Ibid, p. 676).

Although the determination of sovereignty lies within the province of the executive branch of the government yet we may consider the few cases in the Federal courts in which the Guano Act was brought in issue.

Graflin v. Navassa Phosphate Co. (Duncan petitioner)
35 Fed. 474 (C.C., Md. 1888)

This was a petition by the widow of one Captain Peter Duncan to have an alleged dower in the Island of Navassa

assigned

assigned to her or to be allowed a gross sum as a reasonable compensation for the same. The petition alleged that the petitioner's late husband discovered a deposit of guano on the Island, took possession, and upon presentation to the Department of State of evidence of discovery, occupation and peaceable possession was declared to be entitled to the rights secured under the Guano Act. It further alleged that through mesne assignments the title to the Island became vested in the Navassa Phosphate Company and that the petitioner never joined in the deed by which her late husband conveyed his title and interest and never released her dower therein. It was further alleged that under the Guano Act the United States assumed jurisdiction of the Island, that a heritable estate vested in the husband and that, upon his death, the petitioner became entitled to dower.

The defendant Company was in the hands of receivers. They demurred to the petition, contending that the Husband's interest in the Island gave the petitioner no right of dower and that there was no Government having territorial jurisdiction over the Island to whose laws the petitioner could appeal in support of her alleged right.

The Court sustained the demurrer and the petition was dismissed.

The Court said - page 475 -

"Looking

"Looking to the language and purpose of the act of congress, which is entitled 'An Act to authorize protection to be given to citizens of the United States who may discover deposits of guano', we find nothing which indicates that it was the intention of Congress to claim title to or to recognize in the discoverer, who was to be protected in the exclusive occupancy of the island for the purpose of obtaining and shipping guano therefrom, any title to the land; on the contrary, the provisions of the law entirely negative any idea that such islands were in any sense to become part of the territorial domain of the United States. It is clear that the United States extends its protection to the discoverer and his assigns solely to enable him to obtain the guano. The act of Congress does not authorize or countenance the establishment of any form of governmental authority or local tribunal; it does not look to colonization or permanent settlement. It treats these islands, as in fact they are, as unsuited for permanent settlement by civilized communities, and as only temporarily occupied for the purpose of obtaining the guano. In order that while thus temporarily occupied by citizens of the United States the occupants may not be without some lawful means of suppressing disorders, the act provides that all offenses or crimes committed by persons who may land on such island or in the waters adjacent thereto shall be deemed to have been committed on the high seas on board a merchant vessel of the United States, and be punished according to the laws of the United States relating to such vessels and offenses on the high seas. It seems to us impossible to escape the conclusion that all that was intended was to afford governmental sanction and protection to the exercise of a commercial privilege, by which guano might be obtained and furnished for the use of agriculture in the United States; and it does not seem to us maintainable that, by extending this sort of protection for this purpose to an enterprise to be carried on upon small, uninhabitable coral islands in remote seas, the act of congress extended to them the common-law doctrines applicable to heritable estates in land in highly civilized communities, including the widow's right of dower in lands of her husband, disposed of by him in his life-time without her concurrence. Dower is always dependent upon the lex loci rei sitae, and it is obvious that no system of law has ever been established on the island of Navassa, except so far as, for the punishment of offenses by those temporarily occupying it, the maritime law with regard to offenses upon ships of the United States has been made applicable to it."

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The case was taken on appeal to the Supreme Court of the United States (137 U.S. 647 - 1891). The Supreme Court affirmed the decree of the lower court but did not find it necessary to pass upon the question of the sovereignty of the United States over the Island. It contended itself with holding that the petitioner's late husband had no more than a license to occupy the Island for the purpose of removing guano and that his interest could not be considered to be an estate in land but rather an estate at the will of the United States and not subject to dower at common law. In the course of the opinion the Court said that it was a matter of grave doubt whether the common law as to dower could be held to be in force in the Island of Navassa.

The Court further said -

> "Congress has not legislated concerning any civil rights upon guano Island; but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own."

Since the Court decided the case on the ground stated above its decision furnishes no criterion for determining the soundness of the statements made by the lower court as to the non-exercise of dominion by the United States over Islands occupied under the Guano Act.

Jones v. United States 137 U.S. 202 (1890.)

This was an indictment found in the District Court of the United States for the District of Maryland and

remanded

remanded to the Circuit Court alleging that the defendant had committed murder on Navassa Island "a place which then and there was under the sole and exclusive jurisdiction of the United States" - - and "recognized and considered by the United States as appertaining to the United States and, which was then and there in the possession of the United States, - - -".

The defendant filed a general demurrer which was overruled. On a plea of not guilty, the jury returned a verdict of guilty and the case was brought to this court on a bill of exceptions. The constitutionality of the act was called in question by a motion in arrest of judgment, after the verdict. This motion was overruled.

The Court held that the act was constitutional, that the Island must be considered as appertaining to the United States, that the trial court had jurisdiction, and affirmed the judgment. In the course of its opinion the Court stated -

> "By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession, (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the

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nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.) para. 161, 165, 176, note 104; Halleck on International Law, c. 6, para. 7, 15; 1 Phillimore on International Law (3rd ed.) para. 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) para. 266, 277, 300; Whiton v. Albany Ins. Co., 109 Mass. 24, 31."

The court held that the allegations of the indictment set out above, were in accord with the facts.

In discussing the provision in the act reserving the right of the United States to discontinue possession of an Island after the removal of guano, the Court said that reference to this provision in diplomatic correspondence with the Haitian Government over the Island "has, to say the least, no tendency to show that the United States had not for the time being assumed dominion over the Island".

One of the exceptions taken by the defendant was to the exclusion of evidence, presented by him, that a foreign vessel was loaded at the Island with guano intended for the use of persons other than citizens or residents of the United States and that this breach of the contion of the occupants bond worked a forfeiture of his rights. The Court held that this evidence had no significance saying that a breach of the bond "affected the private rights only of the delinquent, and did not impair the dominion

of

of the United States or the jurisdiction of their Courts."

B. With Specific Reference to Swan Islands.

It is proposed in this section to outline administrative action bearing directly on the status of the Islands and to reveal the uncertainty which has characterized such action until the last decade. Some material which might properly be included here has been set out above; the arrangement of material will be chronological.

In 1919 former Assistant Secretary of State Adee wrote a short memorandum to the Secretary (811.0141 Sw 2/61) in which he stated - "The whole question of the Swan Islands has long been somewhat thorny and I hardly venture to take a definite position in regard thereto." This characterization of Mr. Adee, familiar as he was with Guano Islands, is most apt, particularly with respect to the failure of this Government to take a consistent and in some cases definite position as to the status of the Islands.

In 1863 one M. P. Parish wrote the Department making inquiry as to the quantity and quality of guano on Swan Islands. In reply (letter of March 23, 1863 - 60 Dom. Let.68) it was stated in part -

> "It is proper to say that while these proofs were considered sufficient to authorize the Government to extend the protection asked for, under the Act of August 18, 1856 - - -".

On

On March 29, 1864, the French Minister in Washington addressed a letter to the Secretary of State asking the meaning of the Guano Act with respect to the "protection of the United States over the territory" of the Swan Islands. In reply the Secretary stated (April 2, 1864, Dip.Cor. 1864, Pt. III, pp. 210-211) "that it is unusual and it is deemed inadvisable to give an executive interpretation of an act of Congress in advance of a case which may actually occur under such act".

On December 15, 1885, this Department addressed a letter to the Treasury Department (158 Dom.Let. 202) in which receipt was acknowledged of a letter from the Treasury Department asking for a complete list of the Guano Islands "now under the protection of the United States flag". It was stated - "In reply, I beg to state that the accuracy of any list of Guano Islands which this Department might furnish could only be verified by the First Comptroller of the Treasury in whose office are filed all the bonds of Guano Islands appertaining to the United States."

In 1894 A. W. Brash made inquiry as to Swan Islands. He was informed in a letter of February 27, 1894, (194 Dom. Let. 590) that "Swan Islands - - - upon the submission of satisfactory proof that the laws of the United States relating to Guano Islands had been complied with, were, about the year 1863, declared to appertain to the United States."

States." Brash made a request for a concession. He was informed that " - -the laws of the United States are designed to secure to the discoverer, his heirs, representatives, and assigns, the right to take guano under certain prescribed regulations and do not contemplate the granting by this Government of concessions to other persons." This letter should be contrasted with a subsequent letter to the same individual under date of Oct. 29, 1894 (199 Dom.Let. 266) in which it was stated "in reference to your letter of the 24th inst. I have to say that there is not found in the files of the Department any evidence that Swan Islands have ever been recognized as 'appertaining to the United States' under the Guano Islands Act of 1856."

In 1896 a bill was introduced in the Senate for the establishment of a lighthouse on Swan Island. The bill was referred to the Committee on Commerce which submitted a report. The opening paragraph of the Report (S.R. No. 606 - 54th C. 1st S.) reads - "The Committee on Commerce to whom was referred the bill (S. 2549) for the establishment of a lighthouse on Swan Islands belonging to the United States, in the Caribbean Sea, make a favorable report on the same." Later in the Report it was stated -

> "As to the political phase of the question: The Swan Islands are guano islands, and as such were the first islands taken possession of by

citizens

citizens of the United States after the passage and under the provisions of the act of Congress in relation to such islands, enacted in 1856. The United States, through Mr. Seward, the then Secretary of State, proclaimed in February 1863, that those islands were under the protection of the United States. In the technical phrase of the act they are 'islands appertaining to the United States'; and they have for forty years been owned and continuously inhabited and operated by citizens of the United States. They are now owned by Mr. Warren K. Blodgett, of Boston, Mass.

"In the opinion of the committee it is important to the Government of the United States that these islands should remain in its control, and that this control should be fixed for all time. This result can easily be accomplished by the establishment of a Government light-house, where the constant presence of a paid agent of the United States would make permanent possession by United States citizens a certainty.

"Swan Islands are but 95 miles from the coast of Honduras, 150 miles from the coast of Nicaragua, 250 miles from Cuba, 200 miles from British Honduras, and 380 miles from Jamaica. As has been shown, they occupy a strategic position in the western part of the Caribbean Sea which is of great importance; and probably there is no other island which can in any way approach them in this respect. The United States purchases coal for its Caribbean squadron at the British port of Kingston, Jamaica, but what could it do in case of difficulty with England?

"The islands lie in deep water, and by the construction of a breakwater could have a harbor which would hold the whole Navy of the United States. They are fertile, and are noted for their healthfulness and freedom from the West Indian malaria. Several years ago a hospital was established there as a refuge from the Southern fever, and now a well-known New York physician is considering the question of establishing a sanitarium there.

"There is no complication in regard to the government of the islands, such as might exist in the case of a larger and populous island. There are no inhabitants. The island is occupied by four or

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> five citizens of Massachusetts and Connecticut, whose families are still living here; negro labor is brought, during the working season, from other islands, and sent back when the season's work is over."

As an appendix to the report there is a letter from the Department of Justice to the Chairman of the Committee on Commerce of the Senate under date of April 1, 1896. It appears from this letter that the bill and the Report of the Committee had been referred to the Attorney General for his opinion on that part of the report relating to the title of the said Island. The Attorney General made reference to the case of Duncan V. Navassa Phosphate Co. (supra) and Jones v. United States (supra) and concluded -

> "Thus, it seems that not only the sovereignty over the island, but the proprietorship thereof, is in the United States, subject to a usufructuary interest of a temporary character in the discoverer or his assigns, which while it lasts might possibly be made the basis of a claim for damages if interfered with by any public occupation, although such occupation by authority of Congress would probably be held to be a revocation pro tanto of the license."

There is also included in the Appendix under the title "Tobacco from Little Swan Island - protectorate of the United States", a letter from the Treasury Department to the Collector of Customs in Key West under date of September 14, 1893. In this letter it was stated that the Department had considered the question presented by the Collector as to the liability to duty of tobacco imported at Key West from the Swan Islands and that the Solicitor of the Treasury Department "expressed the opinion that,

as said Islands have been taken possession of under the provisions of sec. 5570 Revised Statutes and the conditions of law complied with, they appertain to or belong to the United States, and are under its exclusive jurisdiction for the time being, and that leaf tobacco grown by American citizens on Islands bearing this political relation to the United States is not subject to duty when imported into this country". The Collector was authorized to admit such tobacco free of duty.

On September 12, 1904, the Attorneys for Alonzo Adams, G. L. and H. T. Smith, asked if the Department would receive proof under the guano act. The Department answered that it would receive such proof without prejudice to prior claims. It was further stated "This Department would be called upon to consider only the question whether the Island belonged to a foreign government in case such government should make a claim to it." (See Memo. dated Oct. 24, 1907, in Num. File, V. 191, No. 1804.)

On September 24, 1904, the Department of State informed the Department of Commerce and Labor that the Swan Islands were listed as guano islands "and that under the Guano Act the United States exercises jurisdiction over such Islands solely for the purpose of extracting guano". (Memo. of March 3, 1911, 811.0141 Sw 2/21) This letter arose out

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a request by Adams that he be permitted to ship fruit from Swan Islands on foreign vessels to Mobile.

On December 31, 1904, the Secretary of State wrote to the Postmaster General (279 Dom.Let. 387) as follows:

> "I have the honor to acknowledge the receipt of your letter of the 27th instant, inquiring whether or not Swan Island, in the Caribbean Sea is a possession of the United States, and to state in reply that Great and Little Swan Islands appear on the List of Guano Islands appertaining to the United States, bonded under the Act of August 18, 1856, as appears from bonds on file in the office of the Comptroller of the Treasury.
>
> "The United States possesses no sovereign or territorial rights over the islands, but under guano acts citizens of the United States who discovered guano on the islands, or their assigns, are protected in the prosecution of their enterprise which extends only to the appropriation and disposal of the guano thereon."

In 1908 one H. W. Wack made inquiry as to the status of the islands by letter of February 4, 1908, (Num. File, V. 191, No. 1804/1). The Department quoted from the above letter, under date of September 24, 1904, to the Department of Commerce and Labor.

In 1909 the Department of Labor and Commerce made inquiry as to the country to which the Swan Islands belonged. This Department, in a letter of June 19, 1909 (Num. File, V. 191, No. 1804/5), made answer that they "appear on a list of Islands appertaining to the United States bonder [sic] under the guano acts of 1856."

On September 10, 1909, the Department of Commerce and Labor addressed a letter to the Department of State (Num. File,

File, V. 191, 1904 811.0141 Sw 2/17), in which an enclosure was a letter from the Collector of Customs at Mobile, Alabama. In this letter the Collector stated that a letter received from the Bureau of Navigation indicated that the Bureau considered the islands to be American possessions to be governed under coast-wise laws. He further stated that a letter from the Secretary of the Treasury, under date of February 23, 1909, instructed him "that importations of dutiable articles should be treated as foreign and assessed with duty."

On November 2, 1909, the Department of State answered an inquiry of the Department of Commerce and Labor as to the status of the Islands by stating (Num. File V. 191, 1804/16) "-- parties are now in correspondence with this Department, concerning the question of the continuance by the United States of jurisdiction over Swan Island as a guano island, and that as soon as a determination of the question is reached, the Department will advise you thereof."

On June 5, 1913, the Secretary of Commerce and Labor wrote the Department asking whether the islands were "within the jurisdiction of the United States" with respect to an act providing for the licensing of radio stations "within the jurisdiction of the United States." On June 3, 1914, this Department sent letters to the

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War Department and the Navy Department and the Department of Commerce (811.0141 Sw 2/31). In the letters it was stated "the Department will be pleased to receive an expression of your views regarding the desirability of formally extending the jurisdiction and control of the United States over these Islands." In the letter to the Department of Commerce it was further stated - "at the present time it appears doubtful whether the Swan Island is fully within the jurisdiction of the United States for the purposes of the Act mentioned [radio stations 'within the jurisdiction of the United States']. The Department is considering the advisability of recommending the issuance of an Executive Order formally extending the jurisdiction and control of the United States over Swan Island, actually two small Islands". The replies of these Departments are of interest. The Department of Commerce (letter of June 8, 1914 - 811.0141 Sw 2/32) favored the acquisition of the Islands by formal act because of the importance of radio communication with the Panama Canal Zone. The Navy Department (letter of June 23, 1914, 811.0141 Sw 2/23) favored the elimination of uncertainty as to lands near the outlying interests of the United States on general considerations if no controversy exists and no formal claim is made by other nations. The War Department, by letter of July 9,

July 9, 1914 (811.0141 Sw 2/35), found " - - no military reason why the jurisdiction and control of the United States should be extended over the Swan Islands".

In a letter dated April 5, 1915, to one Le Baron (811.0141 Sw 2/38), the Department asnwered his inquiry by stating that the Islands "were, on February 11, 1863, declared to appertain to the United States". It was added " - - the question of the present political relations of the Islands to the United States is now receiving the consideration of this Department".

In 1916 Messrs. Smith and Cooper made inquiry of the Department as to the sovereignty over the Swan Islands. They were informed by letter of March 8, 1916, (811.0141 Sw 2/42) that the Islands "appear on the list of guano islands appertaining to the United States - -". A similar letter was sent to the representative of the Marconi Company on September 4, 1916 (811.0141 Sw 2/45).

A memorandum of the Solicitor's Office under date of July 11, 1917, (811.0141 Sw 2/46) instructed the Diplomatic Bureau as to the answer to be made to an inquiry from the Navy Department. On February 4 it was stated " - - while it appears that the Government of the United States has not at any time admitted the sovereignty of any other nation over these islands it also appears that this Govern- has taken no steps to extend its own sovereignty over them".

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The suggestion was made that by Congressional enactment an administration over them could be set up and sovereignty extended.

On June 28, 1918, the Navy Department wrote a letter to the Department of State (811.0141 Sw 2/49) in which it was stated that the islands were important to the Navy as a radio station because of the possibility of submarine activities in the Gulf of Mexico, and that the suggestion had been made to the President on April 12, 1918, that a naval commander land and "proclaim them to be under the sovereignty of the United States and thereafter appoint a military Governor of the islands to exercise the functions of sovereignty as was done in the case of the islands of Samoa and Guam."

In 1918 the Secretary of the Navy asked the Attorney General for an opinion as to the sovereignty over Swan Islands. The opinion of the Attorney General may be found in 31 Ops. 216. The request of the Secretary of the Navy was divided into two questions: first, has the United States Government acquired sovereignty over the said Islands by virtue of the guano Act; second, if such sovereignty has not been so acquired has the United States at present the right to extend its sovereignty over the said Islands. The opinion contained a summary of the "chain of title from the original discovery and occupation of the said Islands."

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This summary was probably based upon memoranda and the opinion of the Solicitor of the Navy Department attached to the letter of inquiry. These documents were obviously incomplete since the Attorney General stated, page 129 - "it nowhere appears, however, that any executive action was taken by the President or, on his behalf through the Secretary of State, at any time which could be construed as an exercise of the discretion conferred upon the President by the act of August 18, 1856, such as to amount to a declaration that the Swan Islands were considered as appertaining to the United States." He concluded that when the Albion Chemical Company abandoned the Islands in 1904 all right and title of the discoverer and his successors to that date terminated and the President's discretion, which could have been exercised prior to that date, could no longer be so exercised. He further concluded that after the reoccupation of the Islands in 1904 by Adams, the guano act had not been complied with and for that reason, the President could not have exercised the discretion conferred on him by the act. Thus he was clearly of the opinion that the United States had never acquired "sovereignty of any kind or to any extent over the Swan Islands" under the guano act.

The Attorney General then discussed the second question. He referred to the memoranda submitted with the letter of

inquiry

inquiry and stated that it was apparent that "since the period of the original discovery", save for a slight lapse of some hours, "these Islands have always been claimed and occupied by citizens of the United States, and that no other Government has attempted to assert any dominion over them or right and title to any property in them." He then referred to the commercial development of the Islands after 1904, concluding - "these facts and circumstances are sufficient in my opinion to warrant the statement that no other country has any proper claim to these Islands and that the United States Government may at any time assert its sovereignty over them by appropriate action." He refused to pass on the nature of such action, since he considered that question to be one for the executive and legislative branches of the Government. This opinion should be contrasted with the subsequent opinion, handed down in 1925, to be discussed post.

On August 5, 1919, the Department answered the inquiry of the Franklin Baker Company as to the status of the Island (811.0141 Sw 2/56), by saying that the Islands "appear on a list of guano islands appertaining to the United States - - -".

On August 20, 1919, this Department informed the Navy Department (811.0141 Sw 2/56a) in answering the request for an opinion as to sovereignty, that " - - it apparently would require an act of Congress to make the Swan Islands legally

legally a part of the United States".

During the year 1919 a proclamation was prepared by the Navy Department for the President's signature in which the recital was made that the islands were "under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other Government" and that they "are reserved for naval purposes". This proclamation was never signed.

On February 27, 1920, the Department informed one J. B. Egan (811.0141 Sw 2/59) in response to his inquiry as to the status of the Islands, - "In reply you are informed that, while the Swan Islands are practically under the control of the United States Government, it apparently would require an act of Congress to make them legally a part of the United States."

In a telegram to one L. A. Sackett under date of January 17, 1921, (811.0141 Sw 2/64) the Department stated "Swan Islands are on a list of guano islands appertaining to the United States - - -".

On August 26, 1922, the Department sent a letter to Henry Cabot Lodge (811.0141 Sw 2/77) in which it was stated:

> "In so far as the Guano Islands Act is concerned, I may state that it has never been authoritatively determined that the United States claims any sovereignty or territorial rights over Guano Islands, which appertain to the United

States,

States, other than that necessarily exercised in the protection of American citizens, who are engaged in the removal of guano therefrom. It is understood that neither the Swan Islands Commercial Company nor the United Fruit Company are actually engaged in removing guano from these islands at the present time."

* * * * *

"In view, however, of the fact that these islands were discovered by an American citizen and have since that date been practically continuously occupied by American citizens, this Government does not admit of the claim of the Honduran Government to sovereignty over the islands and the matter is now the subject of diplomatic discussion between the two Governments concerned."

In 1925, the Department received a letter from John Jacob Rogers of the House of Representatives enclosing a letter to him from one Charles S. Smith, Boston, connected with the Swan Islands Trustees (successors to the Swan Island Commercial Company) in which latter letter it was stated - "I might say in this connection that cocoanuts that are now imported from the Islands come in free of duty". Rogers requested the Department's advice on the status of the Islands. He was informed by letter of March 9, 1925, (811.0141 Sw 2/83) that the Swan Islands were regarded as "guano islands appertaining to the United States pursuant to the Guano Islands Act of 1856". Since 1921, however, the status of the Islands has been the subject of diplomatic negotiations between this Government and Honduras.

On August 21, 1924, the Secretary of State made inquiry of the Attorney General with respect to the jurisdiction

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of the United States over the Swan Islands. The opinion of the Attorney General bears date of June 24, 1925, and may be found in 34 Ops. 507.

In the letter of the Secretary of State, reference was made to the opinion of the Attorney General of February 8, 1918, (supra) and to the fact that the statement of facts then submitted by the Secretary of the Navy was incomplete. It was pointed out that in February, 1863, the Secretary of State had issued a certificate to the New York Guano Company under the provisions of the Act. The Attorney General referred to this certificate and said - p. 511 - "Had a copy of that certificate been supplied to the Attorney General [in 1918] I would have no doubt but that he would have answered the first question in the affirmative". Reference was made to the certificate and to instructions of the Secretary of the Treasury issued in 1869, directing Collectors of Customs to enforce the provisions of the coastwise shipping laws to guano islands appertaining to the United States. The Attorney General said, "It appears, therefore, that the certificate set forth above was considered by both the Secretary of State and the Secretary of the Treasury as a sufficient proclamation of the extension of sovereignty over the Swan Islands - ". The concluding paragraph of the opinion read as follows:

"The

"The fact that the Albion Chemical and Export Company, successor to the New York Guano Company, abandoned Swan Islands on February 5, 1904, and that Mr. Alonzo Adams reoccupied and took possession of the islands on February 6, 1904, does not affect the sovereignty of the United States over said islands.

"Sovereignty of the United States having once been extended, no act of the tenant or licensee could deprive the United States of its dominion over said islands. Jones v. United States, supra, p. 224. There the court had under consideration the effect of an alleged breach of bond given under the Guano Islands Act with reference to the Navassa Island. The court said: 'But whenever the breach took place, it affected the private rights only of the delinquent, and did not impair the dominion of the United States or the jurisdiction of their courts.'

"It is my opinion, therefore, that the dominion of the United States Government was extended over the Swan Islands by the President, as evidenced by the certificate of Secretary Seward, dated February 11, 1863, and that the sovereignty of the United States attached to said islands as of that date."

In 1927 one Charles H. Innes made inquiry as to the status of the Islands. He was informed by letter of October 28, 1927, (811.0141 Sw 2/90) that the Attorney General's opinion of June 24, 1925, holds that "dominion of the United States was extended over the Swan Islands by the President by a certificate of Secretary of State Seward, dated February 11, 1863, and that the sovereignty of the United States attached to the said Islands as of that date".

As stated above, the Cuban Government in 1927, suggested the joint maintenance of a wireless and meteorological station by the Governments of Cuba, Great Britain, United

States

States and Mexico. An instruction to the American Embassy at Havana made claim to sovereignty on the basis of the opinion of the Attorney General (November 18, 1927, 811.0141 Sw 2/98). A telegram to the Embassy under date of April 19, 1928, stated -

> "In the past, this Government has consistently taken the position that the full expense for the maintenance of meteorological stations should devolve upon the Government having sovereignty over the particular location."

With respect to the Cuban suggestion a letter was received by this Department from the Department of Agriculture. (Dec. 10, 1927 - 811.0141 Sw 2/93). It was stated -

> "It is proper to state that a station on Swan Island is probably more important than any other station in the Caribbean region in connection with the study and forecasting of hurricanes passing over the Caribbean Sea and Gulf regions, and in connection with navigation in this locality, both aerial and marine."

On July 25, 1928, (811.0141 Sw 2/112) the Department of Commerce informed this Department that arrangements had been made with the Tropical Radio Company for meteorological reports from August 1 to October 30, 1928.

A memorandum of the Latin American Division of this Department (Feb. 27, 1929 - 811.0141 Sw 2/118) states that the Weather Bureau had given the information that the same service was to be rendered during the summer of 1929.

A letter from the Department of Agriculture (April 3, 1929 - 811.0141 Sw 2/122) stated that the funds for the service

service in 1929 had been provided for and that the "question of establishing a permanent station on Great Swan Island would be deferred for another year."

V.

PRINCIPLES OF INTERNATIONAL LAW.

It is now proposed to examine in sufficient detail the principles of International Law, as laid down by jurisconsults and in international cases, which have application to the legal status of Swan Islands. Too extensive quotation will not be made in the body of this memorandum: however, in Appendix A hereto certain material will be quoted in extenso.

Before these principles are considered brief definition will be given of the terms "discovery" and "discovered".

"The term discovery refers to the ascertaining of the existence of territory previously unknown to civilization. Such an act is not in itself assertive of dominion".

Hyde - International Law, Vol. I, p. 163.

"In no just acceptation of the term can a country be said to be 'discovered', if its existence has been previously ascertained by actual sight."

Upshur, Secretary of State, to Everett
MS Inst., Great Britain, XV, 148, 165
(I Moore-Digest 260).

The first part of this section will be devoted to the statements of the treatise writers; the second to the principles maintained in international cases. The material in the first part will be roughly divided according to the following headings: Discovery, Contiguity, Prescription,

and

and Abandonment.

A. Treatises

1. Discovery.

A brief paragraph from Moore's Digest (Vol. I, p. 258) may serve as a statement of the generally accepted principle of International Law, in force at present.

> "Title by occupation is gained by the discovery, use and settlement of territory not occupied by a civilized power. Discovery only gives an inchoate title, which must be confirmed by use or settlement."

This doctrine has not always prevailed in its present form. Thus, Upshur, Secretary of State, writing to Everett (Inst. Great Britain XV, 149 - I Moore Digest 259) stated -

> "The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood at that time, and not by the improved and more enlightened opinion of three centuries later."

Westlake (International Law - 1904 - Pt. I, 99) writes -

> "The Spaniards - possibly only because they were the first comers in America - carried extremely far the claim to have occupied vast tracts of territory by the representative effect of acts done at certain points. No geographical conception seemed too large to be embraced as a unit by the animus of the occupant. - - Such claims the English and other late comers on the scene could not and did not admit."

Hyde writes - (International Law - 1912 - Vol. I, p. 164)

> "While it was admitted that the ascertaining of the existence of territory and the formal taking possession of it might not suffice to create a complete right of property and control, it was generally maintained that the acts of the discoverer afforded his sovereign at least an exclusive

right

> right within a reasonable time to perfect his title by use and settlement. Concerning what were the limits of a reasonable time, therewas no unanimity of view. Such wide latitude was claimed and enjoyed by European States in availing themselves of so-called discoveries in their behalf, that in practice the distinction between the legal effect of such acts and that of explorations followed by settlement for a long time meant little. In the sixteenth century the discoverer brought into being rights which might safely be slept upon for generations."

Oppenheim states (International Law - 4th Ed. 1928 - Vol. I p. 449) -

> "In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. In the age of discoveries, States maintained that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations. And although later on a real <u>taking possession</u> was considered necessary, it was not until the eighteenth century that the writers on the Law of Nations postulated an <u>effective</u> occupation or until the nineteenth century that the practice of the States accorded with this postulate." See also - Hall - International Law (6th Ed.) p. 101 et seq. II Moore - Digest 33.

The nineteenth century found the present doctrine fully formulated and accepted. Consultation of the authorities cited in Appendix A will show that discovery must be followed by effective occupation. Such occupation is "a process which is only available for use in relation to lands not subjected to a claim of sovereignty deemed to be entitled to respect." (Hyde - op.cit. p. 165)

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Such occupation must be open and notified to other nations. It must consist of settlement and use although it seems to be the usage of nations that a reasonable time may elapse after discovery before settlement is actually made. Occupation must, to vest the right of sovereignty in a State, be a State act or receive ratification and acknowledgment by the State after the occupation has been effected. Oppenheim requires not only settlement but also administration, for effective occupation. (op.cit., p. 450). He adds that discovery alone gives an inchoate title which must be converted into a real title by occupation within a reasonable time; otherwise, the inchoate title falls and the land is open to the effective occupation of other States.

The nature of the essential use and occupation is not fixed - it may be for a particular trade such as a fishery, or for working mines, or pastoral occupations as well as agriculture. But it must be continuous use. (Phillimore - op.cit. p. 333 and 345). Such continuous use may be "either by residence or by taking from it its natural products." (Hall - op.cit. - p. 101). As to use within a reasonable time he adds - "What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light

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of the circumstances of each case as a whole". Of course, the animus or intent to take effective occupation must be present.

2. Contiguity.

It is usually difficult to determine the extent of territory over which a State may have taken effective occupation. This difficulty is increased when a claim to actually unoccupied territory is based upon the ground of proximity. In a number of cases (some of which will be discussed, post) a State has made claim to islands lying off its coast. If the island is within the marginal sea or is composed of alluvium no doubt arises, in the ordinary case. However, as in the present case, the island may be at a considerable distance from the mainland.

Calvo states (Le Droit International - Troisiéme Edition - Tome I, 361) -

> "La domaine souverain sur les îles formées par alluvion appartient indubitablement à la nation dont les terres et les eaux omt contribués à les former. Lorsque les îles sont situées prés de la terre firme, on les considére comme ses dépendances naturelles, a moins qu'un État étranger n'ait acquis des titres á leur propriété.
>
> "La possession et l'occupation de la terre ferme supposent et entraínent celles des îles adjacentes, alors même qu'on n'y aurait exercé aucun acte positif de propriété. En ce qui concerne ces îles, on peut dire que si un État étranger quelconque essayait de les coloniser, il donnerait à celui dont elles dépendent au juste sujet de plainte et même de guerre en persistant dans l'intention de s'en emparer.

"La

"La possession des îles situées à une certaine distance de la terre ferme s'acquiert aux mêmes titres que celle de tout autre territoire."

Westlake (op.cit.) states, p. 166 -

"If an island lies entirely outside the range of territorial water measured from the mainland or from any other island, the original acquisition of title to it or to any part of it must depend on the same principle as the original acquisition of title to a part of a continent."

Hyde (op.cit.) said, Vol. I, p. 173 -

"On principle, unoccupied islands in the open sea and beyond the territorial waters of a State are not, by reason of their relative proximity of its shores, to be deemed a part of its domain. Such was the contention of the United States in 1852, with respect to the Lobos Islands off the coast of Peru.

"At the present time, however, a maritime power would neglect its interests should it fail to assert some form of control over an island in such contiguity to its ocean coast as to afford a menace thereto if acquired by a foreign State; and such assertion might be regarded as equivalent to occupation, even though the island remained uninhabited. The dangers from adverse possession, due in part to the range of modern guns and the potentialities of various instruments of war when offered lodgment near enemy territory, have served to widen the distance from the mainland within which an island would doubtless now be regarded as both politically and geographically appurtenant to it. It is not believed, therefore, that the case is to be anticipated which will present an instance of effective adverse occupation as against an enlightened maritime power with respect to a contiguous island which could be fairly deemed of military importance to it."

The practical foundation for whatever principle there is on this subject is obvious. For a full discussion of this principle, see - Memorandum of the United States,

Island

States, Island of Palmas Arbitration, p. 111 et seq.

3. Prescription.

There has been, seemingly, some difference of opinion as to the existence in International Law of the doctrine of prescription. However, it is now generally admitted. Thus, Phillimore writes (op. cit., p. 329) -

> "It is true that some later writers on the Law of Nations have denied that the doctrine of Prescription has any place in the system of International Law. But their opinion is overwhelmed by authority, at variance with practice and usage, and inconsistent with the reason of the thing. Grotius, Heineccius, Wolff, Mably, Vattel, Rutherford, Wheaton, and Burke, constitute a greatly preponderating array of authorities, both as to number and weight, upon the opposite side."

Oppenheim provides a definition (op.cit. p. 469)

> "And prescription in International Law may therefore be defined as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order. Thus, prescription in International Law has the same rational basis as prescription in Municipal Law - namely, the creation of stability of order."

He goes on to say that no general rule can be laid down as to the length of time and other circumstances, that everything "depends upon the merits of the individual case". He cites an example -

> "When - - - a State which originally held an island mala fide under a title by occupation, knowing well that this land had already been

occupied

> occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest, and has silently dropped the claim, the conviction will be prevalent among the members of the Family of Nations that the present condition of things is in conformity with international order."

Phillimore (op.cit. p. 367) states the "proofs of prescriptive possession", as follows -

> "Publicity, continued occupation, absence of interruption (usurpatio), aided no doubt generally, both morally and legally speaking, by the employment of labour and capital upon the possession by the new possessor during the period of the silence, or the passiveness (inertia), or the absence of any attempt to exercise proprietary rights by the former possessor."

Hyde states (op.cit., p. 193) -

> "It must be clear that it is uninterrupted and undisturbed possession implying full acquiescence on the part of the foreign and dispossessed claimant, which in theory serves to rob it of its rights and to lodge them in the actual occupant." And further
>
> "Notwithstanding the ease or difficulty with which the occupant may be able to prove its case without recourse to the doctrine of prescription, the right to invoke and apply it may prove to be valuable as a means of barring a colorless adverse claim, and in discouraging its preferrment."

Calvo approves of the doctrine of prescription, considering it, up to a certain point, more necessary between sovereign States than between individuals, since international disagreements are of more importance than private quarrels. International tranquility must be preserved. It ought not be permitted, he says, that States should resort, to

establish

establish original possession, to the dark dim ages of the past.

Other considerations are emphasized by writers. The possession must be undisturbed; hence if there are continued protests there cannot be that sort of possession which the need for international order might ordinarily ripen into full sovereign control. Seemingly ignorance on the part of the State against which the doctrine is invoked will prevent the operation of the principle. If there is no justification for silence the rights of the original State are lost, other circumstances being proper. Acquiescence may be indicated by word or deed. (Phillimore, op. cit. p. 394). Emphasis is laid on the necessity for the stable condition of affairs in the relations of States and on the inability of States to adduce early proofs because of the passage of time.

In conclusion it should be pointed out that the doctrine of prescription is not dependent upon prior dereliction or abandonment. Westlake (op.cit. p. 103) points out an interesting idea in this connection. He says that one school of writers takes the position that a real title to a given area could be secured by intention without effective occupation and that this title is lost, through a presumption of abandonment, if effective occupation is not made. On such presumption the doctrine of

prescription

prescription is supposed to rest. Such is not its basis, most probably.

As Phillimore says (op.cit., p. 367) -

> " - - -in cases where the dereliction is capable of proof, the new possessor may found his claim upon original Occupation alone, without calling in the aid of Prescription. The loss of the former, and the gain of the latter possessor, are distinct and separate facts. Whereas, in cases of Prescriptive Acquisition, the facts are necessarily connected; the former possessor loses, because the new one gains."

4. Abandonment or Dereliction.

Hyde (op.cit., p. 197) furnishes a definition -

> "Rights of property and control become extinct when, by a process known as abandonment, a State, as an incident of losing possession, gives them up, and no immediate successor is at hand to keep them alive. In such case the territory becomes res nullius and is thereupon open to occupation by any other State. In this respect abandonment differs, as has been observed, from relinquishment. Circumstances indicating abandonment rarely occur."

It seems clear that the intent to abandon the right of property and control is essential to a valid abandonment. However, Hyde (op. cit. p. 199) suggests that the design to abandon "might be established by evidence of long-continued and complete neglect of the territory - - -".

Dereliction should not be lightly assumed. Phillimore (op.cit., p. 396) cautions that derelection is not often left and should not, where possible, be left to the inferences of legal presumption, adding - "The

solemn

solemn renunciation of territory and of rights by a State is one of the most important subjects of both Public and International Jurisprudence."

Twiss (op. cit. p. 201) holds that discovery without actual occupation gives rise to the presumption of occupation within a reasonable time; that this presumption is rebutted by the failure to effect such occupation and gives rise to the opposite presumption of abandonment. He goes on to say (p. 210 et seq.) that settlement, supervening on mere discovery, may constitute a perfect title, whose immediate validity will "depend upon one or other condition, that the right of discovery has been waived de jure by non-user, or that the right of occupancy has been renounced de facto by the abandonment of the territory. He adds - "Again, the presumption of Law will always be in favour of a title by settlement." And further -

> "Title by settlement, though originally imperfect, may be thus perfected by enjoyment during a reasonable lapse of time, the presumption of Law from undisturbed possession being, that there is no prior owner, because there is no claimant, and no better proprietary right, because there is no asserted right. The silence of other parties raises a presumption of their acquiescence, and their acquiescence raises a presumption of a defect of title on their part, or of an abandonment of their title. A title once abandoned, whether tacitly or expressly, cannot be resumed."

B.

B. International Cases.

It is not proposed to consider in detail all cases which relate to islands; however, certain cases to which the United States was a party will be relied upon to show what the attitude of this government has been and what principles of law have been held to be controlling.

The so-called Palmas Island Case, decided by a member of the Permanent Court of Arbitration pursuant to an agreement of January 23, 1925, between the United States and the Netherlands, is similar in many respects to the case now under consideration. This island lies about 70 miles away from the Island Mindanao, in the Philippine group, and was claimed by the United States by virtue of the title of Spain, transferred, it was argued, by the Treaty of Paris. The island was about equidistant from the nearest Netherlands possession. The American case was rested, as stated by the Arbitrator, on early discovery by the Spaniards and on the principle of geographical contiguity. (Other arguments need not be considered). Under the circumstances it was the American view that it was unnecessary to establish facts showing the actual display of sovereignty over the Island. The Netherlands case urged the loss of early Spanish title and contested the doctrine of contiguity. It relied upon certain possessory acts and the exercise of sovereignty at different times

and

and in various ways since 1677. The significance of these acts was contested by the United States.

In certain preliminary remarks (Arbitral Award - April 4, 1928 - p. 15 et seq.) the Arbitrator stressed the present doctrine of effective occupation and the necessity for the maintenance of effective territorial sovereignty. Territorial sovereignty must rest on "concrete manifestations " rather than on "abstract right". He concludes -

> " - - -if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid erga omnes, the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criteriom of territorial sovereignty."

In discussing the American case the Arbitrator admitted that, for present purposes, the original title derived from discovery belonged to Spain. (p. 25). However, he held that there was nothing before him to show the taking of possession of the island or the exercise of administration or even the affirmation of sovereignty. He stated, p. 26 -

> "Both Parties are also agreedthat a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."

He stated the doctrine (with reservation as to soundness) of sovereignty through mere discovery and without effective possession and passed on to the status of sovereignty at

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the time of the Treaty of Paris. The discussion which follows is important enough to warrant quotation in full. It will be commented upon later.

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons discovery alone without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.
>
> "If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within

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> a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared."

Beginning on page 39 the Arbitrator discussed the doctrine of contiguity, saying -

> " - - - it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size)".

He denied the existence of exact precedents and considered the principle so unsettled and contested that even "Governments of the same State have on different occasions maintained contradictory opinions as to its soundness." He denounced the principle "as a legal method of deciding questions of territorial sovereignty" since it lacks precision and in application would lead to arbitrary results.

The Arbitrator then proceeded to discuss the Netherlands' claim, which rested, in general, on the exercise

of

of sovereignty over the island since the 17th century.

He said -

> "If the claim to sovereignty is based on the continuous and peaceful display of State authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region."

Beginning on page 57 he states his conclusions. An introductory paragraph reads -

> "The Netherlands on the contrary found their claim to sovereignty essentially on the title of peaceful and continuous display of state authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of state authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time."

In discussing the continuity of display of authority he said, page 58 -

> "The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as

possessing

possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

"It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial power over a native State, and in regard to outlying possessions of such a vassal state."

As to prescription and notification he said, page 59 -

"As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of state authority (so-called prescription) some of which have been discussed in the United States Counter Memorandum, the following must be said:

"The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial states. A clandestine exercise of state authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

"Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers of 1885 for the African continent does not apply <u>de plano</u> to other regions, and thus the contract with Taruna of 1855, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification".

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He concluded that the Netherlands Government had acquired sovereignty and that the United States, by reason of Spanish discovery, had at best an "inchoate title " which could not prevail over a "definite title founded on continuous and peaceful display of sovereignty". He added - "The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."

Around the middle of the last century a dispute arose between the United States and Peru as to Peru's sovereignty over Lobos Islands, guano islands lying twenty to thirty miles off the coast of Peru. After it had been demonstrated that Peru had exercised jurisdiction for a long period the United States withdrew its protest against title in Peur. However, some of Mr. Webster's (then Secretary of State) observations are of value. For half a century American citizens had fished and sealed near and on Lobos Islands before Peruvian interruption. This fact was emphasized by Mr. Webster in a letter dated August 21, 1852, to the Peruvian representative at Washington. (Sen. Rep. No. 397 34th Cong., 3rd Sess. p. 36). He said -

> "And if Peru has suffered these barren rocks to be visited and used by citizens of the United States for a long course of time, and for all the purposes for which they were known to be valuable, is the case altered when they are found

capable

> capable of a new use? Is it not the natural inference either that Peru never claimed any exclusive right over the Islands, or that, if such claim had been made by any formal or official act of the government, such claim had been abandoned, at least, so far as citizens of the United States were concerned."

Peru made the contention that the islands were under its sovereignty because they had been under Spanish sovereignty and because of continuity. To these contentions Mr. Webster made reply (ibid. p. 41)

> "In this case, therefore, the authority of Alcedo cannot be regarded as decisive. In order that it should be so considered, the undersigned must be informed what act of jurisdiction his Catholic Majesty exercised over these islands. The occasional visits of Indians from the neighboring continent, to which Mr. Osma refers, cannot be said to have imparted to the sovereign of Spain or the government of Peru even, as good a title to those islands as the habitual resort thither of the vessels of the United States, so long and uninterruptedly continued, for the purpose of capturing seals on their shores and whales in the adjacent ocean, would give to the United States. The use of these islands by the Peruvian Indians for the last half century has no doubt been vastly less than by the citizens of the United States; and, upon the ground of Mr. Osma's argument, a better title could be asserted by possession on the part of the United States than could be maintained by Peru.
>
> "As to the claim of Peru to those islands, founded on the law of proximity, the question will appear to be free of doubt. The well settled rule of modern public law on this point is, that the right of jurisdiction of any nation whose territories may border on the sea extends to the distance of a cannon-shot, of three marine miles from the shore, this being the supposed limit to which a defence of the coast from the land itself can be extended.

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"The whole discussion, therefore, must turn upon this, viz: the Lobos islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity or adjacent position, has the government of that country execised such unequivocal acts of absolute sovereignty and ownership over them as give to her a right to their exclusive possession, as against the United States and their citizens, by the law of indisputable possession? And the undersigned repeats that this is not a question between Peru and other governments who may have more or less distinctly admitted her right, but it is a question between Peru and the United States, who have so long exercised that right and remonstrated against its interruption.

"The government of the United States, however, is prepared to give due consideration to all facts tending to show possession or occupancy of the Lobos islands by Peru, and is not inclined to stop or preclude discussion until the whole matter shall be thoroughly investigated. If there are any facts or arguments which have not been brought to its consideration they shall receive the most respectful and friendly attention. If it shall turn out that, as has been intimated above, those islands are uninhabited and uninhabitable, and therefore incapable of being legally possessed or held by any one nation, they and their contents must be considered as the common property of all; or, if unprotected by the presence of Peruvian authorities and without actual possession, their use has been by Peru abandoned or conceded, without limitation of time, to citizens of the United States for a long period, or yielded in consequence of the remonstrance of this Government or its agents, then no exclusive ownership can be pretended as against the United States at least."

A dispute arose between the United States and Venezuela as to Venezuel'a sovereignty over the Aves or Bird Islands, Venezuela having driven off American citizens engaged in the extraction of guano thereon. This government presented

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a claim for indemnity for losses suffered, on the ground that the islands were derelict and not under the sovereignty of Venezuela. The question was settled by the payment of an indemnity by Venezuela, the United States engaging to make no claim to the islands. The islands lie at a great distance (almost 300 miles) from Venezuela and are nearer certain Dutch possessions in the West Indies. (The Netherlands Government later made claim to them.) In a letter under date of January 24, 1855, (Sen. Ex. Doc. No. 25, 34th Cong. 3d S., p. 4) the then Secretary of State, Marcy, stated to the American Minister at Caracas -

> "It is not necessary to inquire who were the first discoverers of the island in question, for that fact of itself, unaccompanied by others, would give no right to dominion over it. The Aves Islands have been known probably more than three hundred years, but have ever been regarded as uninhabitable and valueless. No nation has deemed them of sufficient importance to be reduced to possession. As we understand the case, they were not embraced within the sovereignty of any power, but were derelict. - - -She [Venezuela] has exhibited to the world no such manifestations of ownership as any other nation is bound to recognize or respect. She certainly can found no plausible pretext to claim it as her own by reason of its proximity to any of her acknowledged territories. Other powers have possessions much nearer to it than any of hers."

The Venezuelan Government, however, took the position, in a note of October 31, 1857, (Sen. Doc. Vol. IV 1860-1861 36th Cong. 2d S., p. 346) that -

> "The right of Venezuela to Aves Island can not be rejected on the score of continuity, because,

according

> according to the law of nations, islands adjacent to a continent are reputed to be natural dependencies of the territory of the nation which possesses it, unless there be proof to the contrary; because to such a nation, infinitely more than to any other nation, is the dominion of such islands important for its security both by land and by sea; and because Aves Island has no continent more immediate than that of Venezuela, since, although it be nearer to the possessions of other nations, those possessions are mere colonies or isles themselves, which up to a certain time also belonged to Spain."

The dispute between Venezuela and the Netherlands went to arbitration before the Queen of Spain. (See V Moore's Digest 5037-5040 for the text of the award, in Spanish). The award was in favor of Venezuela. The fact of discovery by Spain was stressed, that act having given Spain a dominion to which Venezuela succeeded. It was admitted that neither Spain or Venezuela had occupied the islands but it was pointed out that the Netherlands had done no more, save for making use of the fisheries of the islands of its colonists and that the Dutch had shown no intent to acquire the island or to occupy continuously. The award concluded with the statement that Venezela was "the first to send armed forces there and exercise acts of sovereignty thus confirming the dominion which it acquired under a general title derived from Spain; - - -"

In 1870 a dispute arose between the United States and Haiti as to the sovereignty alleged by Haiti over Havassa Island. This Island was taken possession of by an American citizen in 1857 to whom a certificate under the Guano Act

was issued by the Secretary of State in December 1859. Haiti attempted to interfere with the extraction of guano but protection was given by the United States to its citizens who were engaged in the removal thereof. The position of the United States was taken in some detail in two letters to one Stephen Preston, the representative of the Haitian Government in the United States. Both letters were in reply to letters of that individual in which the position of the Haitian Government was set out at length. These letters were dated, respectively, December 31, 1870, and June 10, 1873, and may be found in - Notes to Haiti, I, pp. 124, 153. In response to the arguments advanced, Mr. Fish, the then Secretary of State, made the following remarks:

> "That the Island has long been known to navigators, as you state, will not be denied; that it's first discovery, at least among modern nations, belongs to a Spanish navigator may also be admitted, but discovery alone is not enough to give dominion and jurisdiction to the sovereigns or Governments of a nation to which the discoverer belongs, such discovery must be followed by possession." (Mr. Fish then quoted from Vattel).

He then took up the basis for the Haitian claim and commented that "not one instance is given of the actual occupation of the Island previous to its possession and occupancy by Citizens of the United States in 1857."

The Haitian position relied in part on the Treaty of 1777 between France and Spain by which France acquired territory in San Domingo; this treaty was used as the basis

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for an argument that Navassa Island became a dependency of the French part of the Island. Mr. Fish stated that this implication was by no means certain and added - "it is certain, however, that that Island is not mentioned in the Treaty." He then referred to the Constitutions of Haiti and particularly that of 1805 in which certain islands were mentioned as integral parts of the Empire. Navassa Island was not one of those mentioned. Mr. Fish commented -

> "The omission to enumerate Navasa with those claimed is a significant fact. "Expressio unius exclusio es alterius'. If the Government of Haiti for the time being had supposed that it had any right or interest to include Navasa among its dependencies that course would certainly have been pursued on such an occasion."

He further remarked that later constitutions failed to include by name the Island of Navasa.

In answer to another argument he said -

> " - - -it is worthy of notice that no instance is given in which Haitihas ever attempted to enforce any of its revenue laws in Navassa, nor in which that Government has established or maintained customs officers there, or indeed resorted to any of the ordinary means for the protection of its revenue."

He continued -

> "The utmost to which the argument in her behalf amounts, is a claim to a constructive possession, or rather to a right of possession, but, in contemplation of international law, such claim of a right to possession is not enough to establish the right of a Nation to exclusive territorial sovereignty." (Further quotation from Vattel was made."

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He then discussed the Guano Act and said that "it advances no new or strange political dogma, sets up no new unusual or unheard of claim for territory, violated no settled principle of international law."

Following the quotations of certain provisions of that Act he said -

> "The negative propositions of non-occupancy and absence of jurisdiction of any other Government were shown to exist by satisfactory proof; by the very best evidence of which such a case is in its nature susceptible - the entire absence of inhabitants and the undisturbed condition of the rich deposits of guano, which must have been accumulating from a time long anterior to the date fixed by Haitias that of the first discovery of the Island; and although fifteen years have elapsed since Duncan and Cooper discovered and settled upon the Island, no evidence has yet been adduced by Haiti going to establish the affirmative proposition of its ever having been occupied or even showing any act of positive jurisdiction having ever been exercised over it by that Government."

In the Haitian case reference was made to the fact that the United States refused to recognize the claim of a certain firm, under the Guano Act, to the Island Alta Velo on the ground that it was claimed by the Government of St. Domingo. In answer Mr. Fish stated that that Island was in much closer proximity to Dominican territory than Navassa is to Haitian territory and that it formed part of a group of Islands the nearest of which was within a marine league from the shore. He made reference to a Spanish report in which it was stated that the Island was specifically named

and

named and made part of one of the Dominican provinces by law.

Mr. Preston made answer to the above arguments and presented his case anew. Mr. Fish replied in the letter of June 10, 1873. In further reference to the argument based on the acquisition of Haiti by France from Spain he said -

> " - - -it is not therefore to be inferred that Navassa followed Haiti".

As to the case of Alta-Velo he added -

> " - - -it was shown to have been included by name within a political and also within a judicial District of San Domingo. Alta-Velo was the subject of Legislation and the theatre of judicial administration under the sovereignty and laws of San Domingo, features which as I shall presently have occasion to show are entirely wanting in the relation which Haiti maintains towards the Island of Navassa; - - -".

One of the Haitian arguments was that possession was established by the fact that a few Haitian fishermen touched at Navassa in the course of their fishing voyages. Mr. Fish remarked -

> "Surely it is not upon such isolated facts as these that this prime element of title 'use and occupation', can be made to depend, in a dispute - between private proprietors. Such possession would not be deemed sufficient grounds upon which to repel a trespasser. It cannot be considered of any weight in establishing the proprietorship of a sovereign nation. Moreover, if the occasional visit of fishermen to the Island could have any weight in establishing the fact of ownership, San Domingo, Jamaica, Cuba and possibly Porto Rico

would

would probably stand in as good an attitude towards that question as Haiti. But the fact is that the alleged visits of these fishermen were not for the object of possessing or occupying the Island, but for the mere convenience of temporary shelter while passing in the prosecution of a trade, - a privilege which the fishermen of other adjacent Islands might and probably did avail themselves of in common with Haitians and residents of the Island of San Domingo. That their visits were occasional deprives them of the nature of permanence, which is essential to the occupancy whereby jurisdiction or title can be maintained."

Mr. Fish stressed the fact that -

"It is now nearly one half a century since the independence of Haiti was acknowledged by the King of France, and yet, as I am warranted in assuming from the failure to produce the proof, the statute books of Haiti contain no act or law in relation to Nevassa; no statute prescribing the terms upon which it may be occupied, or regulating the working and proprietorship of its rich and revenue yielding deposits; nor has there been yet produced from the archives or public records of Haiti a transcript of any document in which even the name of Navassa appears. The exercise of jurisdiction is one of the highest evidences of sovereignty; the extension of the laws of an Empire over a colonial possession forms one of the chief monuments of the nation's title to sovereignty over the colony, and the absence of these important links in the chain of testimony advanced in support of Haiti's claim to sovereignty over Navassa must, I submit, appear to any reasonable mind fatal to that claim, nor can this absence be supplied by the facts of contiguity of situation, or that Navassa had up to the date of Peter Duncan's discovery remained a wilderness. About these latter facts there has not been nor can there be, any dispute. They are established by nature, and neither science nor research can shed any more light on them. I see nothing to be gained by the submission which you propose, to the determination of third parties."

Seemingly Mr. Fish's position was such that the Haitian Government did not persist in pressing its claim.

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In 1916, as outlined above, the jurisdiction of the United States was formally extended over Navassa. In 1905 this Department denied the territorial sovereignty of the United States over the Island. (Supra)

VI.

CONCLUSIONS

This section will be divided into two broad divisions:

A. Analysis of the Honduran Claim, on the Facts and Law.

B. Analysis of the Claim of the United States, on the Facts and Law.

Subdivisions will be resorted to if clarity of exposition requires. It is hoped that the conclusions reached may be unprejudiced and may partake more of the judicial than the argumentative.

A. Analysis of Honduran Claim.

1. The status of the islands under Spain, to the year 1823.

Certain conclusions immediately present themselves. The islands were undoubtedly discovered by Spanish navigators in the early part of the 16th century; they were not occupied indeed, it is most doubtful if a landing was made and even symbolic possession taken; their existence was well known but no interest was manifested in them; references in the maps considered seem purely geographic and, so far as may be judged, have no exact political significance; there is nothing to show that the islands were included within any governmental or religious district; uninhabited, unoccupied, (save temporarily, perhaps, by pirates), of

no

no economic importance, they remained unnoticed by all save passing mariners.

But they were discovered by Spain. Under the simple rules of International Law accepted at that time they became, by that fact alone, part of the royal domain of Spain. Title having been thus legally acquired it remained vested in Spain although no further cognizance was taken of the islands and no additional acts were performed with relation thereto. During the 17th and 18th centuries International Law still gave validity to a title acquired by mere discovery. However, the doctrine was undergoing modification in the latter century and soon the principle of effective occupation was to be evolved and generally accepted. The effect of this new doctrine on ancient titles was considered by the Arbitrator in the Palmas Island Case; a long excerpt from his opinion is set out above. There is no necessity now for considering the soundness of his views. In the event of a conflict of claims, after the development of the modern doctrine, some merit may be accorded the Arbitrator's contention; that question will be considered later, after Honduras has appeared on the scene. But the Spanish title was not contested prior to the year of Central American independence; so, Spain could peacefully sleep on her rights and doubtless could have conveyed perfect title to another State. In such event, it is not

necessary

necessary to determine what, if any, acts would have been obligatory on the grantee State under the modern doctrine.

I conclude, therefore, that title to the Swan Islands was in Spain to the date of Central American freedom.

Before the subsequent history of the islands is considered further reference should be made to the significance of maps and cartographic material. This subject was considered by the Arbitrator in the Palmas Island Case. A great number of maps were submitted by both parties. Such material was characterized by the Arbitrator as a method of "indirect proof". His view was that no weight could be given maps or the statements of cartographers, sources of information unknown, if in conflict with "legally relevent facts." His introductory statement (Award - p. 36) emphasizes the fact that maps can be used as bearing on sovereignty "only with the greatest caution"; that maps not showing the political distribution of territories must be rejected save for their value in showing geographic location; such value is weakened if the cartographer has merely followed existing maps. He added (p. 38) - "Any how, a map affords only an indication - and that a very indirect one - and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights.

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The same subject was considered by Secretary of State Fish in his letters to the Haytian representative in the dispute over Navassa Island (supra). In his first letter he laid stress on the fact that although maps might show the position of the island they failed to show any connection between the island and the claiming State. He added later (p. 142) -

> "It is true a variety of proofs are brought forward to show that the existence of Navasa has long been known. It is found on Maps of early and of later date, but it is difficult to understand why the specification in or omission of Navasa from any maps ancient or modern, or a mere statement of the position of that Island by geographers could give to any nation a right to sovereignty over it."

The above conclusion as to the sovereignty of Spain was rested not on cartographic evidence but on the mere fact of discovery. However, such evidence has a material bearing on the questions now to be considered. For, if it can be demonstrated that the Swan Islands were clearly a part of an administrative district, to which Honduras succeeded, the Honduran case takes on a greater significance. This question may now be considered.

2. <u>The status of the islands subsequent to 1823 to the time of occupation by American citizens under the Guano Act</u>.

No material, cartographic or otherwise, has been adduced to justify the conclusion that the islands were

ever

ever made a part of any province or district in the political organization of Spanish possessions in Central America. Title to them was in Spain; they lay off the ancient province of Guatemala. But they remained uninhabited islands over which no political control by duly constituted officers was ever exercised. Certain maps cited above might indicate that they were considered to be within the political area of the Province of Guatemala. But, if one considers the nature of such maps and the comments of the Palmas Case Arbitrator and Secretary of State Fish such indications are shown to have slight, if any, evidentiary value. As a consequence, the Honduran argument based upon the postulate that Honduras succeeded to virtually all of the territory of the ancient province of Guatemala is of little value.

What, then, was the status of the islands after Spain lost her Central American possessions? Three hypotheses present themselves: first, they remained under the sovereignty of Spain; second, they became terra nullius; and third, they fell to the Central American Republic. Of the three, the last seems the most reasonable. It is most doubtful if the sovereignty of Spain continued. The islands were of no consequence; they lay a great distance from Cuba and nearer the mainland of Central America.

Further,

Further, it is hard to conceive of the islands as being terra nullius at that time. Spain, having title, could not effect abandonment, strictly speaking, without the requisite intent. It is difficult to determine the attitude of Spain. However, it is probable that she did not intend to retain and then abandon title to the islands after the wars of independence but rather suffered the loss of all her possessions in that part of the Caribbean Sea. If so, Spain's title to the islands devolved to the Central American Republic.

This Republic persisted for some years. But did Honduras, after separation, succeed to the title to the Islands? Seemingly, no other State claimed the islands, although there are vague references to Colombia and Nicaragua. One of the States of the Republic succeeded to whatever title was possessed by the Republic. By reason of geographic location it is reasonable to suppose that the successor State was Honduras. The hypothesis of abandonment again seems untenable.

Thus, two conclusions have been reached; first, that title to the islands was in Spain until her Central American possessions were lost; and second, that this title devolved to Honduras. It now seems appropriate to consider the theory, advanced by the Arbitrator in the Palmas Island Case, that a title resting on discovery

alone

alone can be lost, in the absence of effective occupation, by reason of change in the principles of International Law, the doctrine now being that such occupation is essential if more than an inchoate title is to be retained or secured. The Arbitrator's view is quoted in full above. I find difficulty in subscribing to it. On the facts of the case before him there was no necessity to state this alternative ground for decision. In fact, if the case had not disclosed effective occupation by the Dutch, I doubt if the theory would have been formulated. As in Municipal Law so in International Law, the greatest regard should be had for title to real property. The territorial area of a State should be safeguarded by the most definite principles of law. Such principles should receive strict application; the legal consequences of such application should be firm and should not be subject to changes in principle unless it is clear that such effect was intended. So, if the accepted principles of International Law have given rise to an absolute title in a State resting its claim on mere discovery this title, valid when created, should remain in full vigor unless cut off by other principles of law. Mere change in those doctrines relating to the acquisition of title ought not render invalid that which was valid in its genesis. It does not

follow

follow that nations which have acquired title by discovery are to be permitted to sleep on their rights through the ages, if at any time their title are called in question. (Obviously, their slumber is undisturbed and will never come in issue unless another State lays claim to the same territory). International Law has provided other principles which, under proper circumstances, will deprive the sleeping State of its ancient title. These principles are: first, abandonment, and second, prescription. The intent to abandon is an essential element of abandonment; but such intent need not be express - it may rest upon passive acquiescence or appropriate action or non-action. Another State may make effective occupation and by the continuance thereof for a sufficient period of time under certain conditions may cut off the title of the original State, by operation of a doctrine similar to that of adverse possession in Municipal Law.

Thus, in my opinion Spain's title by discovery remained good and passed to Honduras. On this basis, and this alone, rests the Honduran claim to sovereignty. If it should be demonstrated, by other material or by different reasoning, that Spain's title had fallen prior to the wars of independence and that the islands were terra nullius at the birth of the Honduran Republic the case for Honduras would have to rest either on the modern doctrine of effective occupation or upon the alleged principle of contiguity. The case would fall. There is nothing to show that Honduras ever took possession

of

of the islands, ever attempted (until after the present dispute arose) or effected occupation, or ever specifically included the islands, by act or decree, within the territorial area of the Republic. I can give no weight to the continuous and insistent emphasis given the words (appearing in the various Constitutions and elsewhere) "las islas adyacentes." "Adyacentes" is a word of most general scope and import. But it is difficult to see how its meaning can properly include islands, small and completely isolated lying 98 miles from the nearest point on the mainland. The record presented lends itself most readily to the conclusion that the islands covered by the phrase were those of some importance lying close to the main-land - islands such as the Bay Islands. Honduran inactivity cannot be rested upon ignorance or chance - it finds a real basis in complete indifference, an indifference which, as shall be shown, carried over into the next century, even at a time when the islands began to assume a new importance, recognized by certain Honduran officials.

In my opinion the doctrine of contiguity should not, and does not, exist, in its present form at least, as an accepted principle of International Law. In this I subscribe fully to the remarks (supra) of the Arbitrator in the Paslmas Case. The word "contiguity" may be used as a convenient mode of expressing practical reasons. But in each case the test for a claim to territory, based upon

proximity,

proximity, should rest upon considerations of sound practicality. Such considerations are not present in this case. The islands are far removed from the Honduran coast or other possessions; they have no strategic value in matters pertaining to Honduran welfare, security, or policy; there are no economic reasons or circumstances which render the islands necessary to the well being of Honduras; there have been no connections, political, economic or otherwise between the mainland and the islands. And Honduras is willing to lease the islands, for a consideration! This argument in the Honduran Case is deserving of scant attention.

B. Analysis of the Claim of the United States.

After the appearance of American citizens on the islands the Honduran case becomes closely connected with that of the United States. For this reason it is proposed to consider first the claim of the United States and then to trace the effect of American acts on Honduran sovereignty subsequent to 1857, to the date when the present controversy arose, diplomatically. After this latter date, of course, the acts of the parties have no significance and need not be considered.

It is clear that American citizens, around the year 1857, took effective occupation of the islands and have remained, with slight breaks, in continuous possession

to

to the present time. The material set out above under Section III B shows that guano was discovered by an American citizen or citizens between the years 1846 to 1849, that possession of the islands was taken in the name of the United States. Effective possession was probably taken in 1857 for in that year the Secretary of State informed the President that the requirements of the Guano Act had been complied with. In 1858 there were about 12 men on the island. They were abandoned, according to British advices, probably in the latter part of 1858 or the early part of 1859. Presumably occupation was resumed under different auspices because the Secretary of State issued a certificate in 1863 to the New York Guano Company. From this date to the last decade of the century no exact records of occupation are available. The islands were carried on official lists of Guano Islands; presumably extraction of guano persisted. In 1896 the Committee on Commerce of the Senate had before it a bill for the establishment of a light-house on the islands. In its report the Committee stated that the islands were the first taken possession of under the Guano Act; that "they have, for forty years, been owned and continuously inhabited and operated by citizens of the United States"; that at the time they were occupied by

four

four or five citizens, with their families, labor being imported for the working season. In 1904, Adams, the representative of the Albion Chemical and Export Co., abandoned the islands, under orders, but returned the next day, raising the American flag and taking possession in his own name as an American citizen. Prior to this abandonment (according to the Sailing Directions of the Hydrographic Office (1907)) 60 men were constantly employed in extracting guano under the Pacific Guano Co. In 1908 the United Fruit Company erected a wireless station on the islands. In August 1909 this Department stated that there was no longer exploitation of guano. During that year Adams had a petition before the Department for the issuance of a certificate under the Guano Act. No certificate issued, for the requirements of the Act were not complied with. In 1911 an official report to the Navy Department stated that two Americans, operators of the Fruit Company's wireless station, were on the island; that the other inhabitants were negroes working for the Swan Island Commercial Company; and that the son of Adams lives there occasionally for short periods as manager of that company. Guano extraction had ceased, probably not to be resumed. The Company was exporting cocoanuts and satin-wood. In 1927 this Department was informed by the Department of Agriculture that in 1914 the Weather Bureau

had

had established an official station on the islands and had maintained it until 1927. The Central American and Mexican Pilot, issued by the Hydrographic Office in 1927, stated that in 1920 five Americans and fourteen Caymanians were living on the Islands and that the guano deposits had been exhausted.

The above facts are sufficient to justify the conclusion that there has been effective occupation of the islands by American citizens since 1857. They also serve to dispose of the allegations in the Honduran Case as to American occupation. They are not, in themselves, a sufficient basis on which to predicate American sovereignty, regardless of the mode of acquisition. So, we must now consider the legal significance of the Guano Act and acts done thereunder and the attitude of the executive departments of this government.

It is obvious that the title of the United States (if it can be established) must rest upon one of two principles of law: first, original occupation of derelict land; and second, prescription. The acquisition of title under the first principle presupposes abandonment by Honduras, since the conclusion has been reached that Honduras succeeded to the title of Spain. If the islands, through abandonment became <u>terra nullius</u>, the United States must demonstrate, according to accepted principles, effective and continuous

possession

possession and user by its agents or by individuals whose acts it acknowledges and ratifies - that is, there must be the intent to extend jurisdiction and sovereignty. If the United States is to rely upon prescription it must show: notorious, continuous, and undisturbed possession and occupation, as an exercise of sovereignty; probably user; silence, passiveness, or the absence of any attempt, by the former possessor, to exercise proprietary rights; lack of ignorance on the part of such former possessor; and the continuance of such occupation for a period of time long enough to make it desirable, for the tranquillity of international affairs, that the new possessor be considered to have acquired sovereignty and that other nations have that conviction.

Were the islands abandoned by Honduras? There is nothing in the record to indicate that Honduras had the specific intent to release her title. It is necessary, therefore, to determine whether such intent may be implied from acts of non-action. In such determination it should be borne in mind that abandonment cannot be lightly assumed and must be established by clear demonstration. Prior to the occupation of the islands by American citizens, Honduras was not under any obligation to assert sovereignty nor can her indifference to the islands be given any significance. If one may believe the undocumented statement (supra) in the Honduran Case as

to

to the investigation by one Major Burke in the Honduran Archives it is probable that the granting of guano concessions to American citizens in the years 1835 to 1837 constitutes a positive assertion and exercise of sovereignty.

It is not supposed that the material now available is complete. However, it is clear that Honduras manifested, after American occupation, a most remarkable indifference to the islands. This indifference and the failure to assert or exercise positive rights of sovereignty might well serve as a basis for a presumption of abandonment. Indeed, it might be argued that a design to abandon can be adduced from such complete and long-continued neglect. There is little in the Honduran Case to rebut this seeming neglect. However, the Commandant of Trujillo did offer a guano concession to a British firm in Belize in the year 1861. As asserted, he may have sent a commission to investigate the islands. In 1907 an expedition to the islands was planned by the Inspector General of the Treasury; difficulties of transportation prevented the execution of the plan. (The evidence on this point is hardly conclusive). In 1909 Honduras asserted sovereignty and professed, to the Swan Islands Commercial Company, its intent to send a war vessel to the islands. (A similar plan was contemplated later in 1921).

1921). In 1912, if one may believe the bare assertions in the Honduran Case, a report on the islands was prepared for the President of Honduras; the jurisdiction of the Republic was asserted. Despite this interest there is no specific assertion in the Honduran Case of any positive acts of sovereignty on the islands. However, it is my opinion that, under all the circumstances, no intent to abandon can be imputed to Honduras and that the presumption of abandonment, if it arose, has been rebutted. If the passage of time had been of more considerable duration and if the neglect of Honduras had been complete a different conclusion might have been reached. The failure of Honduras to assert her dominion and to extend her laws over guano operations militates strongly against her pretensions. However, this failure finds some justification and partial explanation in the troubled history of the republic.

In any event, the question of abandonment has importance, so far as the American claim is concerned, only if the United States attempted to extend its dominion over the islands, through occupation. The legal significance of occupation under the Guano Act must now be considered.

The Act has been set out in full, above. Its phrasing is so general that the difficulties of interpretation are great. However, certain provisions should be noted. Paragraph 1411 clearly contemplates that only such islands

"not

"not within the lawful jurisdiction of any other govenment" shall be occupied by American citizens. The discoverer of guano was to make such assertion, under oath. This assertion was made as to the Swan Islands, and a certificate, based in part thereon, was issued. If the jurisdiction, or claim of jurisdiction, of another State had been advanced the certificate would have been refused. The Cayo Verde Case, cited above, is illustrative. The mere issuance of a certificate, based upon the represented state of facts, cannot modify or alter the true facts. It would seem to follow that the Swan Islands, dominion over which was in Honduras, were not of that class of islands contemplated in the Act.

The same section provides that islands so possessed may be considered at the discretion of the President "as appertaining to the United States". The use of the word "appertain" is deft, since it carries no exact meaning and lends itself readily to circumstance and the wishes of those using it. It has given rise to such words as "appurtenant" and "appurtenance". The common law denies that land can be appurtenant to land. In a strict sense an island cannot be appurtenant to other territorial possessions. If the word "appertain" and its variants cannot be given a strict meaning they lose what little value they have when relied upon for the creation or

assertion

assertion of legal rights. The meaning of the Act must be found outside the phrase quoted above.

Section 1418 authorizes the President "at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer..." If, upon occupation under the Guano Act, the islands were to become a part of the domain of the United States such authorization would be unnecessary. Further, the President probably would not have received discretionary power.

Section 1419 provides that nothing in the Act "shall be construed as obliging the United States to retain possession of the islands ...." after the removal of guano. If the word "possession" was used in a strict sense it follows that a mere temporary occupation, for a fixed purpose, was contemplated. Of course, possession could be retained. But it is doubtful if the Act contemplated such occupation as would give rise to the right of sovereignty.

Section 1412 stipulates that a discoverer shall show, inter alia, that "possession was taken in the name of the United States...". This condition was included in the Attorney General's opinion of June 2, 1857. As shown above, several certificates recited that occupation was taken in the name of the United States; the Swan Islands certificate did not. But it is my opinion that

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the requisite intent to extend complete sovereignty was not expressed in the Act and was not present in the government.

The debates in the Senate are not very illuminating. As stated above, it seems clear that the primary purpose of the act was to facilitate the exploitation and carriage of guano to the United States. Section 1 of the original bill used the word "appertaining" and carried the additional provisions that at the discretion of the President an island could "be taken possession of in the name of the United States with all necessary formalities". Either this provision was considered unnecessary, under International Law, or the Act, as passed, did not contemplate the extension of sovereignty. The discussion in the Senate is not clear. Seward, the proponent of the bill, spoke of a discovery inuring to the government but went on to say that no question of securing dominion was involved since the Act had reference to uninhabitable rocks "fit for no dominion." One remark should be quoted again - "There is no temptation whatever for the abuse of authority by the establishment of colonies or any other form of permanent occupation there.....The bill itself then provides that whenever the Guano should be exhausted, or cease to be found on the Islands, they should revert and relapse out of the juris-

diction

diction of the United States." The original bill, and the bill which passed, did not contain such definite provision for a "relapse". Obviously, however, no permanent dominion was intended; it is most doubtful if more was intended than a mere temporary possession by American citizens under the protection of the United States.

We may now discuss briefly the few cases in the courts in which the Act was considered.

The case of Graflin v. Navassa Phosphate Co. (supra) involved a question of common law dower. The lower court held that the provisions of the Act "entirely negative any idea that such islands were in any sense to become part of the territorial domain of the United States"; that the Act was intended merely "to afford governmental sanction and protection to the exercise of a commercial privilege"; and that the common law was not in force on the island. On appeal to the Supreme Court this issue was avoided, the court resting its decision on the principle that the interest of the discoverer was not subject to dower rights.

The case of Jones v. United States (supra), decided in the Supreme Court, contains a further discussion of the Act. Certain language in the opinion has been referred to as showing that the dominion of the United States was extended, under the Act, over Navassa Island. That part of the

opinion,

opinion (usually quoted) relating to the principles of discovery and occupation is hardly conclusive. For, in such principles the Court found justification for the Guano Act but did not say that occupation thereunder made the island a part of the public domain. It did state that such principles permitted a nation to "exercise such jurisdiction and for such period as it sees fit over territory so acquired" However, the opinion contains two references to "dominion" of the United States (supra). The first reference implies a temporary dominion - "for the time being". The second was made when the court held that the rights of the individual had no connection with "the dominion of the United States or the jurisdiction of their Courts." One may question whether the Court was using the word "dominion" as implying complete and absolute sovereignty. There was no necessity for the Court to determine the question of sovereignty. The major issues raised were the constitutionality of the Act and the jurisdiction of the court. The first issue could be (and, I believe, was) resolved without consideration of the question of complete sovereignty. The second could be similarly resolved. For, the Act provided for criminal jurisdiction and the indictment merely alleged that Navassa Island was "under the sole and exclusive jurisdiction of the United States" and was recognized "as appertaining to the United

States"

States" and was "in the possession of the United States." Even if the United States had merely a temporary possession of Navassa these allegations of the indictment would be sound. So, if the words of the Court be given their widest meaning they were not necessary for decision and may well be considered dicta. One should also remember that in 1890 Hayti no longer contested the island, the United States having vigorously opposed the Haytian claim.

It may be admitted that the Supreme Court has final authority in the construction and interpretation of acts of Congress. However, it is my opinion that the above cases (the only cases involving the Guano Act) do not stand for the propositions that occupation under the Act brings the occupied islands within the permanent territorial domain of the United States and that full sovereignty has been extended over such islands. If the Act spoke clearly the Court would be bound, for, as was stated in the Jones Case, (p. 212) -

> "Who is the sovereign, de jure or defacto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

Thus, we may now consider the attitude of the executive department, generally and with respect to Swan Islands. If a case involving the islands ever came before the

the Supreme Court it would take judicial notice of that attitude. In the Jones case the court said -

> "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

The opinions of the Attorney General will be first discussed. A formal opinion, printed as such, has no conclusive or binding effect. It has persuasive force and is entitled to profound respect. However, it is entirely advisory and need not be followed by the executive department requesting it. An informal opinion has, of course, no higher standing.

In 1911 the Attorney General addressed a letter to the Secretary of Commerce and Labor with respect to Navassa Island as a possible light-house reservation. (supra) It was definitely stated that the Guano Act did not contemplate "complete title" or the inclusion of the islands within the "territorial domain" of the United States. This letter should be contrasted with that (supra) of a prior Attorney General to the Senate Committee on Commerce when it was contemplated that the Swan Islands might be used for light-house purposes. It was there stated (reliance was placed

on

on the cases cited above) - "Thus, it seems that not only the sovereignty over the island, but the proprietorship thereof, is in the United States..."

In 1918 the Secretary of the Navy asked for an opinion on the sovereignty over Swan Islands. The facts submitted were inadequate since the Attorney General commented that no certificate had been issued. He concluded that the United States had never acquired "sovereignty of any kind or to any extent over the Swan Islands" under the Guano Act. What his conclusion would have been had he known of the certificate is a matter of conjecture. (The opinion is referred to above.)

However, in 1925 the then Attorney General had no doubt on this conjectural point. He said, in the opinion requested by this Department - "Had a copy of that certificate been supplied to the Attorney General I would have no doubt but that he would have answered the first question in the affirmative." This certificate, he affirmed, was considered by the Secretary of State "as a sufficient proclamation of the extension of sovereignty over the Swan Islands." His conclusion was that the issuance of the certificate in 1863 extended "dominion" and "that the sovereignty of the United States attached to said islands as of that date." (The opinion is referred to above).

These

These opinions, taken together, are hardly illuminating. The value to be attributed to them is a matter of personal judgment. I am inclined to give them little weight. They do not contain, in my opinion, sufficiently full consideration of the question and it is doubtful if they are based upon adequate statements of facts. The last opinion, rendered in 1925, followed the diplomatic discussions with Honduras. It is almost completely at variance with the position of this department prior to that year. That position will now be considered.

Its most striking aspect is that of wavering uncertainty - an uncertainty which characterized the attitude of this government with respect to all guano islands. The shirting nature of this position has been traced in detail above. A list of the phrases used by the Department, in response to official and private requests may be instructive. "Protection" - "property of" - "appertain to" - "belong to" - "appear on list of islands appertaining to" - "jurisdiction". These expressions were used prior to the opinion of the Attorney General in 1925. After that opinion sovereignty was claimed.

It is clear that before 1925 no unequivocal assertion of complete sovereignty was made. It is equally clear

that

clear that there were a number of denials of sovereignty. Thus, in 1904 the Department of Commerce and Labor was informed that the United States exercises jurisdiction "solely for the purpose of extracting guano." The Attorney General (14 Ops. 610) stated that he had been informed that such was the policy of this Department and that it was further held that "upon cessation of such occupancy, they become open again to discovery, possession, etc." In the same year the Postmaster General was told that the islands were listed as "appertaining to the United States" but that the United States "possesses no sovereign or territorial rights over the islands" (See above for similar statements as to Christmas and Navassa Islands). In 1914 it was held that the islands were not within the jurisdiction of the United States within the meaning of an act relating to radio stations" within the jurisdiction of the United States." In 1917 the Navy Department was informed that "this Government has taken no steps to extend its own sovereignty" over the islands. The same department was told, in 1917, that it "apparently would require an act of Congress to make the Swan Islands legally a part of the United States". The same reply was made to a private individual in 1920, although it

was

was asserted that the islands "are practically under the control of the United States Government". In 1922 a letter to Henry Cabot Lodge stated - "it has never been authoritatively determined that the United States claims any sovereignty or territorial rights over Guano Islands, which appertain to the United States, other than that necessarily exercised in the protection of American citizens, who are engaged in the removal of guano therefrom.

The Committee on Commerce of the Senate, in 1896, spoke of the islands as "belonging to the United States." In 1893 the Solicitor of the Treasury Department held that tobacco from the islands should be admitted free since they "appertain to or belong to the United States, and are under its exclusive jurisdiction for the time being - -" But in 1909 the Treasury Department ordered that "importations of dutiable articles should be treated as foreign and assessed with duty." In 1918 the Navy Department suggested that a naval commander land and proclaim the islands under the sovereignty of the United States and that a military governor be appointed " to exercise the functions of sovereignty as was done in the case of the islands of Samoa and Guam". In 1919 a proclamation for the President's hand was prepared by that department; it was never signed.

It

It seems clear that the Department of State, prior to 1925, had not considered the islands to be a part of the territorial domain of the United States and in general had subscribed to the view of Secretary of State Cass, stated in his letter to Fabens of June 29, 1857 -

> "The sole and exclusive object of the Act, as written upon its face, is to furnish citizens or residents of the United States a supply of guano, at a reasonable price."

It follows that there has never existed the requisite intent, in the executive branch, to extend the sovereignty of the United States over the islands; that, prior to the dispute with Honduras, no ratification has been made of the occupation by American citizens under the Act or subsequent to the abandonment in 1904; that the lack of such intent precludes the argument that title is in the United States by virtue of effective occupation or prescription. The conclusion has already been reached that Congress did not contemplate that the Act should supply this intent to acquire sovereignty.

Since the view has been asserted that at no time did the United States have the intent to acquire sovereignty it is unnecessary to discuss the meaning of the last section of the Guano Act (as to the relinquishment of possession), or the effect of the abandonment by Adams

in

in 1904, or the significance of the cessation of guano extraction around that time.

Great difficulty has been experienced in formulating the conclusions reached. Definite assertions have been made but each is open to disputation and attack. Infallibility of judgment, particularly in a case so involved as this, is impossible. Care has been taken to leave out of consideration questions of policy or practical expediency. It is my opinion that ample support may be found for the conclusion that sovereignty over the Swan Islands is vested in the Republic of Honduras.

LE:FAF:EVB:SS

APPENDIX A

DISCOVERY

CALVO - LE DROIT INTERNATIONAL (3me Ed.) Tome 1 - p. 319.

" "La découverte de l'Amérique et celles qui vers la fin du moyen âge ont été faites en Asie et an Afrique ont introduit dans le droit international un nouveau mode d'acquisition et de possession: nous voulons parler de la priorité de découverte, de la première occupation et de la colonisation.

"L'état des choses est bien changé depuis l'époque des grandes découvertes jusqu'à la fin du siécle dernier; il ne reste plus, à proprement parler, de contrées à découvrir, selon la portée exacte du mot; l'exploration qui remplace la découverte, a déjà scruté presque tous les coins du globe; il n'est guére que quelques régions de l'intérieur de l'Afrique et quelques îles de l'Océanie que aient jusqu'ici échappé à ses recherches.

"Quoi qu'il en soit, il existe encore des territoires que ne font partie d'aucun État, soit encore inoccupès, soit possédés par des tribus sauvages ou barbares.

Dans le premier cas un État peut acquérir la souveraineté sur de semblables territores par la prise de possession; mais il faut que cette prise de possession soit effective, c'est-à-dire accompagnée ou suivie d'un commencement d'organization administrative ou d'exploitation commerciale ou industrielle dans la pays. Le simple fait de planter un drapeau, des poteaux avec inscriptions, une croix ou d'autres emblêmes ne suffit pas pour donner ou outenir un titre exclusif à un pays dont on n'a point fait un usage actuel, quoique la pratique des nations se soit en bien des case prévalue de mesures semblables.

"La prise de possession peut s'opérer par des particuliers; mais si ceux-ci ont agi sans pouvoirs, leurs actes doivent être ratifiés par l'État duquel ils dépendent, pour que leur occupation revête un définitif et valable à l'égard des autres États. L'histoire des colonies anglaises en Amérique nous fournit des exemples d l'application de ce principe."

Page 321.

"Même dans le case de l'occupation de semblables territoires on conteste aux États de droit de s'en incorporer une plus grande étendue qu'ils ne peuvent en civiliser ou en administrer. Il faut bien comprendre toutefois que cette contestation ne saurait s'appliquer qu'aux acquisitions ou aux occupations récentes, et non aux possessions déjà anciennes, consacrées àla fois par le temps et le droit historique, lesquelles forment, àproprement parler, une exception généralement admis à la régle que précède.

Page 326.

"C'est un fait incontestable que le groupe des Malouines fut découvert par des marins espagnols ou des marins étrangers au service de l'Espagne (1), de sorte que si la simple découverte suffisait pour assurer la propriété d'un territoire, l'Espagne aurait de ce chef à la possession des Malouines un droit antérieur àcelui de toute autre puissance; mais son droit est établi sur un titre ayant pour fondement des principes plus larges et plus généralement admis: le titre de première occupation, ou du moins de substitution aux premiers occupants en vertu d'un acte régulier de cession et de remise.

HALL - INTERNATIONAL LAW (6th Ed. - 1909) pp. 101-105.

"When a state does some act with reference to territory unappropriated by a civilized or semi-civilized state, which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right is gained as against other states, which are bound to recognise the intention to acquire property, accompnied by the fact of possession, as a sufficient ground of proprietary right. The title which is thus obtained, and which is called title by occupation, being based solely upon the fact of appropriation, would in strictness come into existence with the commence-ment of effective control, and would last only while it continued, unless the territory occupied had been so long held that title by occupation had

become

become merged in title by prescription. Hence occupation in its perfect form would suppose an act equivalent to a declaration that a particular territory had been seized as property, and a subsequent continuous use of it either by residence or by taking from it its natural products.

"States have not however been content to assert a right of property over territory actually occupied at a given moment, and consequently to extend their dominion pari passu with the settlement of unappropriated lands. The earth-hunger of colonizing nations has not been so readily satisfied; and it would besides be often inconvenient and sometimes fatal to the growth or perilous to the safety of a colony to confine the property of an occupying state within these narrow limits. Hence it has been common, with a view to future effective appropriation, to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continued enjoyment or control; and it has become the practice in making settlements upon continents or large islands to regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land.

"In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an unsufficient ground or proprietary right. It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate. Thus when an unoccupied country is formally annexed an inchoate title is acquired, whether it has or has not been discovered by the state annexing it; but when the formal act of taking possession is not shortly succeeded by further acts of ownership, the claim of a discoverer to exclude other states is looked upon with more respect than that of a mere appropriator, and when discovery

has

has been made by persons competent to act as agents of a state for the purpose of annexation, it will be presumed that they have used their powers, so that in an indrect manner discovery may be alone enough to set up an inchoate title.

"An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition.

"In order that occupation shall be legally effected it is necessary, either that the person or persons appropriating territory shall be furnished with a general or specific authority to take possession of unappropriated lands on behalf of the state, or else that the occupation shall subsequently be ratified by the state. In the latter

case

case it would seem that something more than the mere act of taking possession must be done in the first instance by the unauthorised occupants. If, for example, colonists establishing themselves in an unappropriated country declare it to belong to the state of which they are members, a simple adoption of their act by the state is enough to complete its title, because by such adoption the fact of possession and the assertion of intention to possess, upon which the right of property by occupation is grounded, are brought fully together. But if an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention of possession, which, being neither declared upon the spot nor supported by local acts, is of no legal value. A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention; where land is occupied by unauthorised colonists, ratification, as has been seen, is able permanently to unite the two; but the act of the uncommissioned navigator is not a state act at the moment of permanent in its local effects it cannot be made one afterwards, so that the two conditions of the existence of property by occupation, the presence of both of which is necessary in some degree, can never co-exist.

"There is no difference of opinion as to the general rule under which the area affected by an act of occupation should be determined. A settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them. When an island of moderate size is in question it is not difficult to see that this rule involves the attribution of property over thw hole to a state taking possession of any one part. But its application to continents or large islands is less readily made."

Page 114.

"It will have been observed in these cases, and it will be found in most of the older cases in which title rests upon occupation, that the acts relied upon as giving title, previously to the actual plantation of a colony, have been scattered at somewhat wide intervals over a long space of time. Until recently this has been natural, and indeed inevitable. When voyages of discovery extended over years, when the coasts and archipelagos lying open to occupation seemed inexhaustible in their vastness, when states knew little of what their own agents or the agents of other countries might be doing, and when communication with established posts was rare and slow, isolated and imperfect acts were properly held to have meaning and value. When therefore it first became worth while to question rights to a given area, or to dispute over its boundaries, the tests of effective occupation were necessarily lax. But of late years a marked change has occurred. Except in some parts of the interior of Africa, there are few patches of the earth's surface the ownership of which can be placed in doubt. With the restriction of the area of possible occupation the desire to secure what remains has often become keener. At the same time the difficulties which often stood in the way of continuity of occupation have vanished before improved means of communication. A tendency has consequently declared itself to exact that more solid grounds of title shall be shown than used to be accepted as sufficient."

HYDE - INTERNATIONAL LAW Vol. I, p. 164-169.

"States were agreed that the native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect. They were also agreed, with the possible exception of Spain and Portugal, that the Pope possessed neither the title to uhknown lands, nor the right to regulate their discovery and exploration.

"As the acquisition of ownership of new lands was always in behalf of the sovereign, and involved public acts for his benefit, it was not supposed that title could be acquired through the efforts of one who was not commissioned, or whose acts were not in

due

due course ratified. Moreover, it was deemed of utmost importance that discoveries and explorations should be proclaimed and widely known.

"While it was admitted that the ascertaining of the existence of territory and the formal taking possession of it might not suffice to create a complete right of property and control, it was generally maintained that the acts of the discoverer afforded his sovereign at least an exclusive right within a reasonable time, to perfect his title by use and settlement. Concerning what were the limits of a reasonable time, there was no unanimity of view. Such wide latitude was claimed and enjoyed by European States in availing themselves of so-called discoveries in their behalf, that in practice the distinction between the legal effect of such acts and that of explorations followed by settlement, for a long time meant little.

"With the gradual acceptance of the principle that a complete right of sovereignty over newly found lands could not be established by any means short of effective occupation, the necessity of shortening the period during which a State might avail itself of a discovery made in its behalf became better understood. If such an act served to create but an inchoate title, it was unreasonable that the steps necessary to perfect it should be delayed indefinitely. Thus, the modern principle was finally accepted that the legal value of discovery depended upon the celerity with which it was followed by effective occupation. In the sixteenth century the discoverer brought into being rights which might be safely slept upon for generations. To-day, were he able to ascertain the existence of lands still unknown to civilization, he would have no significance save as he might herald the advent of the settler.

"Occupation may be described as the assertion, by use and settlement, of sovereignty over territory not already under the dominion of a State or of a country deemed to be capable of exercising an exclusive right of property and control. By such action, as has been observed, a monarch, in former times, perfected his title to lands which his agent had discovered.

"Occupation

"Occupation is thus essentially a means whereby a right of property and control comes into being or is perfected, rather than transferred. It is, therefore, a process which is only available for use in relation to lands not subjected to a claim of sovereignty deemed to be entitled to respect. Nor can it be utilized at such time as there may remain throughout the surface of the earth no territory which is not subjected to such a claim.

"If the physical control of territory effected by settlement and use is essential to the creation of perfecting of an exclusive right of sovereignty, the extent of the area over which such a right should be generally respected ought to be measured and limited accordingly to a like test. Numerous considerations, however, long deterred States from accepting this principle.

"Centuries were required for the settlement of the American continents after their form and size were roughly known. During that interval European monarchs sought, in fierce opposition to each other, to establish rights of property and control over vast and uninhabited areas by virtue of barest lodgments effected along the coasts or within the interior. While it came to be admitted that occupation was necessary in order to perfect a title based on discovery, it was constantly asserted that a State whose nationals had established a number of isolated settlements at points remote from each other, was to be regarded as legally in possession of broad expanses of territory connecting them or extending away from them. Thus constructive, rather than effective occupation was relied upon in support of rights of sovereignty.

"The basis of this doctrine or practice was that the occupant of any given spot might be supposed within a reasonable time to seek to extend his dominion over the surrounding country, because such an extension was either necessary for his own safety, orincidental to his natural development. The application of such a theory was, however, full of difficulties. Questions arose concerning the length of time within which a State might exercise the exclusive right to extend its territory to the surrounding country. There were disputes also with respect to the extent of

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the area over which such a right existed, and concerning the method of adjusting claims to broad and uninhabited areas separating rival settlements.

"As long as portions of the American continents remained in fact unoccupied, and until the boundaries marking the limits of the territories of opposing States were fairly established by treaty, there was little agreement as to the principles which should govern the solution of these problems. Respect for claims to lands actually unoccupied by civilized man was as frequently maintained by the sword as by any other means."

OPPENHEIM - INTERNATIONAL LAW - (4th Ed. - 1928) Vol. 1, pp. 449-450.

"Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Occupation as a mode of acquisition differs from subjugation chiefly in that the subjugated territory previously belonged to another State. Again, occupation differs from cession in that, through cession the acquiring State receives sovereignty over the territory concerned from the former owner-State. Cession, therefore, is a derivative mode of acquisition, whereas occupation is an original mode. And it must be emphasized that occupation can only take place by and for a State; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

"Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, for instance, an island, or inhabited by natives whose community is not to be considered as a State. Natives may live on a territory under a tribal organization which need not be regarded as a State; and even civilised individuals may live and have private property on a territory without forming themsleves into a State proper which exercises sovereignty over such territory. But the territory of any State, even though it is entirely outside the Family of Nations, is not a possible object of

occupation

occupation; and it can only be acquired through cession or subjugation. On the other hand, a territory which once belonged to a State, but has been afterwards abandoned, is a possible object for occupation by another State."

Pages 450-452.

"Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for, the acquiring State. Occupation thus effected is real occupation, and, in contradistinction to fictitious occupation, is named effective occupation. Possession and administration are the two essential facts that constitute an effective occupation.

"(1) Possession.— The territory must really be taken into possession by the occupying State. For this purpose it is necessary that it should take the territory under its sway (corpus) with the intention of acquiring sovereignty over it (animus). This can only be done by a settlement on the territory, accompnied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. It usually consists either of a proclamation or of the hoisting of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is immaterial whether or not some agreement is made with the natives by which they submit themselves to the way of the occupying State. Any such agreement is usually neither understood nor appreciated by them and even if the natives really do understand its meaning it has a moral value only.

"(2) Administration.— After having, in the aforementioned way, taken possession of a territory the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If, within

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a reasonable time after the act of taking possession, the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any State over the territory.

"In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. In the age of the discoveries, States maintained that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations. And although later on a real taking possession was considered necessary, it was not until the eighteenth century that the writers on the Law of Nations postulated an effective occupation or until the nineteenth century that the practice of the States accorded with this postulate. But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an inchoate title; it acts as a temporary bar to occupation by another State for such a period as is reasonably sufficient for effectively occupying the discovered territory. If the period lapses without any attempt by the discovering State to turn its inchoate title into a real title of occupation, the inchoate title perishes, and any other State can now acquire the territory by means of an effective occupation."

PHILLIMORE - INTERNATIONAL LAW - (3rd Ed. - 1879) Vol. 1 p. 329.

"With respect to Original Acquisition, we have first to consider under this head the title which a nation acquires by occupation. Discovery, Use, and Settlement are all ingredients of that Occupation which constitutes a valid title to national acquisitions.

"Discovery,

"Discovery, according to the acknowledged practice of nations, whether originally founded upon Comity or Strict Right, furnishes an inchoate title to possession in the discoverer. But the discoverer must either, in the first instance, be fortified by the public authority and by a commission from the State of which he is a member, or his discovery must be subsequently (o) adopted by that State; otherwise it does not fall, with respect to the protection of the individual, under the cognizance of International Law, except in a limited degree; that is to say, the individual has a natural title to be undisturbed in the possession of the territory which he occupies, as against all third Powers. It will be a question belonging to the Municipal Law of his own country, whether such possessions do not belong to her, and whether he must not hold them under her authority and by her permissions."

P. 331.

"The next step is to consider what facts constitute an Occupation; what are the signs and emblems of its having taken place; for it is a clear principle of International Law, that the title may not be concealed, that the intent to occupy must be manifested by some overt or external acts. The language of the commentators is clear and full upon this point.

"Simul discimus quomodo res in proprietatem iverint: non animi actu solo; neque enim scire alli poterant quid alii suum esse vellent, ut eo abstinerent; et idem velle plures poterant: sed pacto quodam aut expresso, ut per divisonem, aut tacito, ut per occupationem."

Again:

"Requiritur autem corporalis quaedam possessio ad dominium adipiscendum".

And again:

"Praeter animum possessionem desidero, sed qualemcumque, quae probet, me nec corpore desiise possidere".

"These acts, then, by the common consent of nations, must be use of and settlement in the discovered territories."

P. 333.

P. 333.

"Indeed, writers, on International Law agree that Use and Settlement, or, in other words, continuous use, are indispensable elements of occupation properly so called. The mere erection of crosses, landmarks, and inscriptions is ineffectual for acquiring or maintaining an exclusive title to a country of which no real use is made."

P. 345.

"The nature of Occupation is not confined to any one class or description; it must be a beneficial use and occupation (le travail d'appropriation); but it may be by a settlement for the purpose of prosecuting a particular trade, such as a fishery, or for working mines, or pastoral occupations, as well as agriculture, though Bynkershoek is correct in saying "cultura utique et cura agri possessionem quam maxime indicat"."

P. 349.

"It may therefore be considered as a maxim of International Law, that Discovery alone, though accompnied by the erection of some symbol of sovereignty, if unaccompanied by acts of a de facto possession, does not constitute a national acquisition.

"A different opinion appears, indeed, to have been entertained by the officers of Great Britain in 1774, at the period of her temporary abandonment of the Falkland Islands. But the doctrine in the text may now be said to be very generally established."

TWISS - LAW OF NATIONS - (Rev. New Ed. - 1884) pp. 196-197.

"The exclusive right of a Nation to Territory which it has acquired by Occupation, has been universally recognised by the Nations of Europe, and in respect of such Right certain rules have become established by usage, whereby the condition of Law constituting Occupation may be placed beyond doubt. The Natural Right of an individual to appropriate the object of his discovery rests upon the presumption that it has no owner, which presump-

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tion, and consequently a praesumption juris et de jure. But the act of discovery alone does not constitute Occupation by the Law of Nations. The title which results from Discovery is only an inchoate title. It is not recognised in the Roman Law, nor has it a place in the system of Grotius or of Puffendorf. The principle, however, upon which it is based, is noticed by De Wolff."

Pp. 197-200.

"A Nation is under an obligation towards other Nations analogous to that under which an individual stands towards other individuals with regard to the discovery of a thing, if it seeks to found an exclusive title to its possession upon the Right of Discovery. It must manifest in some way or other to other Nations its intentions to appropriate the territory to its own purposes. The Comity of Nations then sanctions a presumption, that the execution of the intention will follow within a reasonable time the announcement of it. But Natural Reason requires that the Discovery should be notified to other Nations, otherwise if actual Possession has not ensued, the obvious inference would be that the Discovery was a transient act, and that the territory was never taken possession of animo et facto. A Discovery accordingly, which has been concealed from other Nations, has never been recognised as a good title to bar them from settling in a territory: it is an inoperative act. Lord Stowell has accordingly noticed, as an indisputable fact, that in newly discovered countries, where a title is meant to be established for the first time, some act of Possession is usually done and proclaimed as a Notification of the fact.

The mode of Notification, in other words, what acts should be respected by the Comity of Nations, and be held sufficient to make known the intention of a Nation to avail itself of a discovery, has been a subject of much dispute. The disposition however of Writers, as well as of Statesmen, has been to limit rather than to extend the Comity of Nations in this respect. Thus Vattel writes, 'The Law of Nations will therefore not acknowledge the Property and Sovereignty of a Nation over any uninhabited countries except those of which it has really taken possession, in which it has formed settlements, or of which it has

actual

actual use. In effect, when Havigators have met with desert countries in which those of other Nations had in their transient visits erected some monuments to show their having taken some possession of them, they have paid as little regard to that empty ceremony, as to the regulation of thePopes, who divided a great part of the world between the Crowns of Castile and Portugal.

"To the same purport, Martens writes, 'Supposé que l'occupation soit possible, il faut encore qu'elle ait eu lieu effectivement; que le fait de la prise de possession ait concouru avec la volntémanifeste de s'an approprier l'objet. La simple déclaration de volonté d'une Nation ne suffit pas, non plus qu'une Donation Papale, ou qu'une Convention entre deux Nations pour imposer à d'autres le devoir de s'abstenir de l'usage ou de l'occupation de l'objet en question. Le simple fait d'avoir été le premier à découvrir ou à visiter une île, &c., abandonnée ensuite, semble insuffissant, même de l'aveu des Nations, tant qu'on n'a point laissé de traces permanentes de possession et de volonté; et ce n'est pas sans raison qu'on a souvent disputé entre les Nations, si des croix, des poteaux, des inscriptions, &c., suffisent pour acquérir ou pour conserver la propriété exclusive d'un pays, qu'on ne cultive pas."

"Kluber to the same effect, writes thus, "Pour acquérir une chose par le moyen de l'occupation, il ne suffit point d'en avoir seulement l'intention, our de s'attribuer une possession purement mentale; la déclaration même de vouloir occuper, faite antérieurement à l'occupation effectuée par un autre, ne suffrait pas. Il faut qu'on ait réellement occupé le premier, et c'est par cela seul, qu'en acquérant un droint exlusif sur la chose, on impose àtout tiers l'obligation de s'en abstenir. L'occupation d'une partie inhabitée et sans maître du Globe de la Terre, ne peut donc s'étendre plus loin qu'on ne peut tenir pour constant qu'il y ait eu effectivement prise de possession, dans l'intention de s'attribuer la propriété. Comme preuves d'une pareille prise de possession, ainsi que de la continuation de la possession en propriété, peuvent servir tous les signes extérieurs qui marquent l'occupation et la possession continue. To this passage there is appended the following note. 'Le droit de propriété

d'état

d'état peut, après le droit des Gens, continuer à exister, sans que l'état continue la possession corporelle. Il suffit qu'il existe un signe, qui dit que la chose n'est ni res nullius, ni dèliassée. En pareil case, personne ne saurait s'approprier la chose, sans ravir de fait à celui, que l'a possédée jusqu'alors en propriété, ce qu'il y a opéré de son influence d'une manière lègitime: enlever ceci, ce serait blesser le droit du propriétaire.'"

WESTLAKE - INTERNATIONAL LAW (1904) Pt. 1, pp. 93-94.

"It may be said at once that there has never been any international agreement, either express or tacit, by which such a lapse of time has been fixed; but on the other hand it has seldom been doubted that the disturbance of long possession by stale claims would be more noxious between states than between private persons, on account of the want of a judicature supported by organised force, and that therefore time must be admitted as having in international right a true though undefined operation. Hence the existence or prescription in international law has been denied or asserted, as the particular author has been more impressed by the difficulty of calling any rule a law which is wanting in exact definition, or by the difficulty of refusing the name of law to a principle constantly acted on with general approval. The principle was based by Grotius and Vattel, as by most writers on natural law, on the presumed abandonment by the former sovereign or owner of a claim with regard to which he has not given due warning of his intention to keep it alive. Both however appear to have felt that the peace of the world would not be sufficiently protected by a presumption which, whenever the occasion arises for urging it, is encountered by the fact that the claim presumed to have been abandoned is actually made--which, even in theory, would allow a claim to be kept alive indefinitely by mere protest--and which at best would allow excuses, not easily appreciable at their true value, to be put foward for not having effectively made the claim erlier. Grotius seems to lean towards a time limit of, speaking roughly, a century, as being that of the memory of one generation and of the activity of three generations. But this suggestion has not been followed. Vattel required a very long possession, neither interrupted nor contested, and the context may indicate that by the latter term he meant something more than not protested against. If so, he seems to

have

have carried the matter as far as it is possible to carry it.

"For the rest, such a doctrine of prescription as is possible in international law has no room for application in a part of the world like modern Europe, in which the state of possession is always regulated by treaty or by the juridical effect of conquest. But we shall see later that there is room for it in new countries, where it has often been questioned whether the abandonment of a right never matured by effective occupation must not be conclusively presumed, and even whether the abandonment of effective occupations, from which the states have made them have afterwards practically withdrawn, must not be presumed. The connection which we shall see that the question of title in new countries had with the theory of possession in Roman law makes it important to remark that in that law the intention to give up possession might be inferred from mere negligence."

Pp. 99-102

"We are now in a position to appreciate the title by discovery put forward at the opening of the great age of discovery. First, it was not imagined that any title could be gained by a discovery made by subjects without authority from their governments. The title, though for shortness it might be spoken of as one by discovery, was always understood to be one by discovery and occupation, and occupation, with the consequent acquisition of dominion, could in the nature of things be only the act of a state. But if a private uncommissioned discoverer professed to acquire for his state, a ratification by it before another power had stepped in would be in time. These principles occasioned little or no difficulty in the fifteenth and sixteenth centuries, when explorers, even though not belonging to the regular service of their countries, were usually furnished with letters patent or some other authority ad hoc. But the United States in the Oregon dispute with Great Britain ran counter to them in founding their claim on the discovery of the mouth of the Columbia River by a private adventurer, Captain Gray, followed by an establishment which one of their citizens, Mr. Astor, made on that river, although up to the time when Astoria was sold to the British Northwest Company their government had not adopted the discovery, and had

returned

returned no answer to the letter by which Mr. Astor had requested it to authorise his proceedings. The British negotiators did not admit the claim, and the region was divided by the treaty of 1848. There is however no serious doubt about the principles. On the one hand a government will gain no title from the discoveries made even by its own expedition, sent out with no other avowed object than that of scientific research; and on the other hand the advance of European states in Africa is usually made at the present day by following, and so far as sovereignty is concerned adopted, the establishments made by their subjects beyond their frontiers.

"Secondly, besides the requirment of state authority there was that of publicity. 'In newly discovered countries,' Lord Stowell said, 'where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact.' Notification is here to be understood in the general sense of making known, and not in the special sense of an express communication to other powers in which it is used in the general act of the African Conference of Berlin. If the discovery was made in a spirit of occupation and by an authority competent for that end, the facts would soon be known through the reports of the voyage which ran round the world. If it was made by private and unauthorised mariners, its adoption by their government would generally be accompanied by some public act like the erection of a fort. But whatever the means by which publicity was effected, it was never thought that either discovery or appropriation could be kept secret and the benefit of it retained.

"These two points being premised, which it would be unfair to support were not assumed even where discovery alone was mentioned, we come to the points of divergence. The Spaniards - possibly only because they were the first comers in America - carried extremely far the claim to have occupied vast tracts of territory by the representative effect of acts done at certain points. No geographical conception seemed to them too large to be embraced as a unit by the animus of an occupant. Thus Venezuela, maintaining old Spanish pretensions in the arbitration between her and England in 1899, put forwarded the whole of Guiana, bounded by the Orinoco, the Czsiquiare, the Amazons

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and the sea, as a unit to every part of which the effect of occupation at any point of it extended. And this exaggeration of the scope of the mental attitude entering into occupation at the expense of the corporal act led, naturally, to reducing the latter to a merely ceremonial one. To read a proclamation, plant a flag, perhaps make some mark on a rock and sail away without building a fort or leaving any other embodiment of power, was represented as taking possession. Such claims the English and other later comers on the scene could not and did not admit. It is true that behind the pretentions there lay a kernel of substance, but it was of a political and not a legal character. Where the king of Spain or any other sovereign built a fort or founded a settlement, the legal doctrine would measure his right in space by the area which the force existing there would enable him to rule from it. Within that range alone could his occupation be strictly called real or effective. But a fort or a settlement may not only be a seat of actual rule but a centre for the extension of that rule; and while the sovereign cannot fairly by delaying such extension exclude the rest of the world for an indefinite time, it would be an unfriendly act f.or another to step in prematurely and cut off his reasonable hopes. Thus, since sound politics cannot be ignored in international law, arose the doctrine that in new countries civilised states only gain conclusive title by effective occupation but yet that a moderate time must be allowed for the extension of such occupation over a reasonable area round the point at which it has been commenced. This is the doctrine of effective occupation, and has usually been contrasted as such with that of title by discovery."

CONTIGUITY.

AMERICAN JOURNAL OF INTERNATIONAL LAW - VOL 12, (1918) p. 520.

"1. Annexation of Territory(a) Contiguity. The claim to unoccupied territory on the ground of proximity is familiar in international law, though it has not always passed without protest. The principle is described as contiguity or continuity, according as the territory in question is or is not separated by water.

"The right of a state to islands within its maritime belt has been universally recognized, and Lord Stowell's well-known decision in the case of the ANNA besides asserting that islands formed of alluvium beyond the three mile limit belong to the mainland, suggests that the same is true of those occupying a strategic position.

"The German Prize Code recognizes 'islands situated not more than six sea miles from the coast' as belonging to a neutral state on the mainland for the purpose of measuring the maritime belt, free from belligerent operations, and Dana asserts that 'islands adjacent to the coast, though not formed by alluvium or increment, are considered as appurtenant, unless some other Power has obtained title to them by some of the recognized modes of acquisition.'

"Peru, following a suggestion of Lord Palmerston in 1834, asserted that the proximity of the Lobos Islands to Peru would give her a prima facie claim to them, although they were over twenty miles distant. A similar basis was offered by Venezuela as a claim to the Aves Islands, by Hayti to Navassa, and among other, by Spain and later Argentine to the Falklands, although the latter are almost two hundred and fifty miles from the mainland. All of these claims gave rise to considerable controversy, the result of which seems to support Mr. Fish's contention in the Navassa case that the utmost to which the argument amounts 'is a claim to a constructive possession, or rather to a right of possession; but in contemplation of international law such claim of a right to possession is not enough to establish the right of a nation to exclusive territorial sovereignty (Vattel, Bk. 1, Chap. XVIII, sec. 208) 'which, according to Mr. Webster in the Lobos Island case, must be supported by 'unequivocal acts of absolute sovereignty and ownership.'

PRESCRIPTION

CALVO - LE DROIT INTERNATIONAL (3rd Edition - 1880)
Vol. 1, p. 317.

"Peut-on, pour les peuples et les États, considérer l'usucapion et la prescripton comme des modes réguliers et normaux d'acquérir la propriété? Si l'on admet que ces deux formes d'acquisition sont fondées et légitimes en droit naturel, on est logiquement conduit à soutenir qu'elles sont également conformes aux principes du droit des gens et que dés lors elles doivent aussi s'appliquer aux nations.

L'usucaption et la prescription sont même, jusqu'à un certain point, plus nécessaires entre États souverains qu'entre particuliers. En effet les démêlés qui s'élèvent de nation à nation ont une tout autre importance que les querelles individuelles: ces dernières peuvent se régler devant les tribunaux, tandis que les conflits internationaux aboutissent trop souvent àla gueere; il faut donc, dans l'intérêt de la paix come dans celui de la bonne harmonie entre les nations et des progrés du genre humain, écarter tout ce quie pourrait jeter de trouble dans le droit de possession des souverains, lequel, lorsqu'il a reçu sans conteste la consécration du temps, doit être regardé comme inprescriptible et légitime. S'il était permis, pour établir la possession primordiale d'un État, de remonter indéfiniment de cours des années et de se perdre dans la nuit des temps les plus reculés, peu de souverains seraient sûrs de leurs droits, et la paix ici-bas deviendrait impossible.

"Vattel fait remarquer à ce sujet que puisque la prescription est sujette à tant de difficultés, il serait trés-convenable que les nations voisines se missent en régle àcet égard par des traités, principalement sur le nombre d'années requis pour fonder une prescription légitime, puisque ce dernier point ne peut être déterminè en général par le droit naturel seul. Si, àdéfaut de traités, la coutume a statué quelque chose en cette matiére, les nations entre lesquelles cette coutume est en vigueur doivent s'y conformer.

"Wheaton, qui prend pour base les principes du droit civil, admet aussi la parfaite légitimité de l'usucapion et de la prescription dans leur application aux États, et soutient que la possession non interrompue

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durant un temps déterminé d'un territoire ou de biens quelconques par un État exclut des droits de tout autre État sur le même territoire ou sur les mêmes biens.

"Quant ánous, nous ne saurions partager les scrupules théoriques de certains juristes, et, pleinment d'accord sur ce point avec les deus authorités que nous venons de citer, nous sommes d'avis que l'usucapion et la prescription sont pour les États des titres tout à fait légitimes d'acquisition."

HYDE - INTERNATIONAL LAW - Vol. I pp. 192-194.

"By operation of the principle known as that of prescription, the uninterrupted exercise of dominion over territory for a sufficient length of time by one State is deemed to destroy the value of adverse claims of sovereignty preferred by any other, and thus to clothe the occupant with such rights of property and control as may once have been vested in such a claimant. These rights do not seem to come into being or derive their origin from prescription. That term betokens rather the means by which they are transferred from a State not in fact exercising them to another which is in actual possession. It thus implies that when the existing occupant first entered into that possession, the territory was already subjected to a dominion which had been productive of rights of property and control, and was not, therefore, at that time res nullius, or available for acquisition by means of occupation.

"Respect for the principle of prescription prevents a State which may have long slept upon its rights, from retaining a solid claim to exercise them at the expense of a foreign occupant whose possession satisfies certain requirements which practice has demanded. The strength of the equities of the latter lies in the implied acquiescence in the condition of affairs which its own conduct in relation to the land concerned has produced.

"It is doubtless possible for a State to dispute actively the validity of its neighbor's claims of sovereignty over territory long in its possession and over which it was the first to establish a right

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of property and control by virtue of occupation never subsequently given up. Notwithstanding the ease or difficulty with which the occupant may be able to prove its case without recourse to the doctrine of prescription, the right to invoke and apply it may prove to be valuable as a means of barring a colorless adverse claim, and in discouraging its preferement.

"Recognition of the principle of prescription has been due to the importance attached to the maintenance of a stable condition of affairs among States. It has been deemed more desirable to the family of nations that an occupant long in possession should be suffered to remain in unmolested control, that an adverse claimant, although unjustly deprived of possession, should retain its rights of sovereignty, unless it made constant and appropriate effort to keep them alive, and that by ceaseless protests against the acts of the wrongdoer. Moreover, prior to the World War, neither the flagrancy of the injustice perpetrated through those acts, nor the methods employed, appeared to diminish respect for the claims of such a wrongdoer, provided it crushed opposition and silenced protest for a sufficiently long time.

"It must be clear that it is uninterrupted and undisturbed possession implying full acquiescence on the part of the foreign and dispossessed claimant, which in theory serves to rob it of its rights and to lodge them in the actual occupant. What constitutes such possession must depend upon the circumstances of the particular case.

"There appears to be as yet no general and definite understanding among States concerning the length of time requisite for the establishment of a title by prescription. Grotius deemed a 'possession beyond memory' (possessio memoria excedens) essential. Possibly at the present day a possession well within the memory of living men might suffice. It has been wisely observed that, in view of the differing circumstances arising in the various cases where the doctrine is not unjustly invoked, no precise period of time can be fixed by international law. In the rules agreed upon by Great Britain and Venezuela in 1897, in the adjustment of the boundary between British Guiana and Venezuela, it was declared that an adverse holding for a period of fifty years would establish a good title."

PHILLIMORE - INTERNATIONAL LAW (3rd Ed.) Vol. 1,p. 367.

"In the foregoing observations, the foundation of International Prescription has not been necessarily laid upon the abandonment or dereliction of the State to whom the possession formerly belonged. It has been placed upon the length of time during which the possession has been held by the State which prescribes for it. It is important to establish clearly that dereliction does not, in the case of nations, necessarily precede prescriptive acquisition. Much of the uncertainty and confusion in the writings of International Jurists upon this subject may be ascribed to the want of firm discrimination and clear statement upon this point.

"Dereliction or voluntary abandonment by the original possessor may be often incapable of proof between nations after the lapse of centuries of adverse possession; whereas the proofs of prescriptive possession are simple and few. They are, principally, publicity, continued occupation, absence of interruption (usurpatio), aided no doubt generally, both morally and legally speaking, by the employment of labour and capital upon the possession by the new possessor during the period of the silence, or the passiveness (inertia), or the absence of any attempt to exercise proprietary rights by the former possessor. The period of time, as has been repeatedly said, cannot be fixed by International Law between nations as it may be by Private Law between individuals; it must depend upon variable and varying circumstances; but in all cases these proofs would be required.

"Now it has been well observed by a recent writer, that in cases where the dereliction is capable of proof, the new possessor may found his claim upon original Occupation alone, without calling in the aid of Prescription. The loss of the former, and the gain of the later possessor, are distinct and separate facts. Whereas, in cases of Prescriptive Acquisition, the facts are necessarily connected; the former possessor loses, because the new one gains."

P. 394.

P. 394.

"Again, if a nation suffer other nations in their mutual arrangements to deal with the right of possession in question as belonging to one of them, and makes no protest in favour of her claims, she must be held to have acquiesced in the transaction. An individual may indicate his acquiescence by his words or by his deed."

OPPENHEIM - INTERNATIONAL LAW (4th Ed.) Vol. I pp. 469-470.

"And prescription in International Law may therefore be defined as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order. Thus, prescription in International Law has the same rational basis as prescription in Municipal Law -- namely, the creation of stability of order.

"From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is not one of law, but of fact. When, to give an example, a State which originally held an island mala fide under a title by occupation, knowing well that this land had already

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been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest, and has silently dropped the claim, the conviction will be prevalent among the members of the Family of Nations that the present condition of things is in conformity with international order. Or, to give another example, when an incorrectly drawn boundary line, which wrongly allots to one of the States concerned a tract of territory, has for a long time been regarded as correct, the conviction will prevail that the present condition of things is in conformity with international order, even if afterwards the wronged State raises a protest and demands that the boundary line should be redrawn. These examples show why a certain number of years cannot, once for all, be fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences besides the mere lapse of time at work to create the conviction that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ."

TWISS - LAW OF NATIONS - (Ed. of 1884) pp. 212-213.

"What lapse of time is requisite to found a valid title by prescription has not been definitely settled. The Law of Nature suggests no rule. Where, however, the claimant cannot undoubted ignorance on his part or on the part of those from whom he derives his right, or cannot justify his silence by dawful and substantial reasons, or has neglected his right for such a number of years as to allow the respective rights of the two parties to become doubtful, the presumption of abandonment will be established against him, and he will be excluded by ordinary prescription. Lapse of time, in the case equally of Nations as of individuals, robs the parties of the means of proof; so that if a bona fide possession were allowed to be questioned by those who have acquiesced for a long time in the enjoyment of a thing by the possessor of

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it, length of possession, instead of strengthening, would impair the title of the possessor; the inconvenience of such a result is so obvious, that the practice of Nations and individuals has equally repudiated it."

WHEATON - INTERNATIONAL LAW (6th Ed.) Vol. 1, pp. 336-337.

"Some modern writers have denied that a valid title to territorial property may be grounded on prescription; but the great majority of jurists and publicists accept it as a principle that is essential to the maintenace of international order and stability. The rules of international law, however, have not prescribed any definite time limits that is to operate as a bar to any claims to territory in the possession of a State. But in the case of disputes, an agreement is sometimes made by the contestants as to the minimum period giving a prescriptive right. Thus, in the boundary dispute between Great Britain and Venezuela, the treaty of Washington (1897) laid down the following rule for the guidance of the arbitral tribunal: 'Adverse holding of prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by by prescription'. It may be added, by way of judicial authority, that in a case before the Judicial Committee of the Privy Council it was held that Conception Bay in Newfoundland must be considered to have become by prescription part of British territory, on the ground that Great Britain had in fact long exercised dominion over it, and the acquiescence of other nations showed her exclusive occupation of it. Similarly, the Supreme Court of the United States had ruled that a boundary, even if incorrectly laid out, cannot be disturbed after a century. But the value of time is not to be exaggerated. The allies, in 1919, undid the outstanding wrong of the partition of Poland in 1795, and the tenure of Alsace-Lorraine for 1871-1914 was regarded as of no weight whatever.

Indiana v. Kentucky, 136 U.S. 479 (1890)

The question in issue in this case was the boundary line between Kentucky and Indiana. One of the principles of law discussed by the Court was the doctrine of prescription. In this connection the Court said, page 510 -

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nations title and rightful authority. In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.'
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> "Vattel, in his Law of Nations, speaking on the same subject, says: 'The tranquillity of the people, the safety of States, the happiness of the human

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race do not allow that the possession, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.' Book II, c. 11, § 149. And Wheaton, in his International Law, says: 'The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question.

ABANDONMENT

HALL - INTERNATIONAL LAW (6th Ed.) p. 115.

"When an occupied territory is definitively abandoned, either voluntarily or in consequence of expulsion by savages or by a power which does not attempt to set up a title for itself by conquest, the right to its possession is lost, and it remains open to occupation by other states than that which originally occupied it. But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by inscriptions, which would be insufficient to confirm the mere act of taking possession; and even where the abandonment is complete an intention to return must be presumed during a reasonable time. If it has been involuntary, the question whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon and following the withdrawal suggest the intention, or give grounds for reasonable hope, of return. Where intention in this case is relied upon, it is evident that, as abandonment was caused by the superior strength of others who might interfere with return, a stronger proof of effective intention must be afforded than on an occasion of voluntary abandonment, and that the effect of a mere claim, based upon the former possession if valid at all, will soon cease.

HYDE - INTERNATIONAL LAW - Vol. I, pp. 197-199.

"Rights of property and control become extinct when, by a process known as abandonment, a State, as an incident of losing possession, gives them up, and no immediate successor is at hand to keepthem alive. In such case the territory becomes res nullius and is thereupon open to occupation by any other State. In this respect abandonment differs, as has been observed, from relinquishment. Circumstances indicating abandonment rarely occur.

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"In 1895, the occupation by Great Britain of the Island of Trinidad was made the subject of protest by the Government of Brazil, on the ground that the latter's right of ownership of the island had never been given up. Abandonment, it was declared by the Brazilian Minister of Foreign Affairs:

> Depends on the intention of relinquishing, or on the cessation of physical power over the thing, and must not be confounded with simple neglect or desertion. A proprietor may leave a thing deserted or neglected and still retain his ownership. The fact of legal possession does not consist in actually holding a thing, but in having it at one's free disposal. The absence of the proprietor, neglect, or desertion does not exclude free disposal, and hence animo retinetur possessio.... Possession is lost corpore only when the ability to dispose of a thing is rendered completely impossible, after the disappearance of the status which permits the owner to dispose of the thing possessed.

"Evidence of either a definite intention of giving up the right of property and control with respect to territory at the disposal of the sovereign, or of a complete cessation of the effort to regain a control wrested from it by an uncivilized people not deemed capable of exercising such a right, would, on principle, seem to be necessary in order to prove abandonment. When the authorities of a State are expelled from territory belonging to it by the superior force of a native and uncivilized population, the loss of control doubtless minimized the legal significance of intention. The hope and expectation entertained by the State of effecting a lodgment and regaining the mastery may not long suffice to keep alive any right of sovereignty. Even in such a case, however, a certain interval of time might fairly be allowed for the reestablishment of actual dominion before regarding the right as extinct.

"When a State appears voluntarily to have deserted territory the control of which constantly remains within its grasp, abandonment should not be deemed to have taken place without ample proof of a design to give up all rights of property and control. Such a design might be established by evidence of long-continued and complete neglect of the territory, or of a formal and appropriate declaration of policy."

TWISS - LAW OF NATIONS (Ed. of 1884) p. 201.

"When Discovery has been followed by the Settlement of a Nation, other Nations in accordance with the Law of Nature recognise a perfect title in the occupant. Where discovery has not been immediately followed by settlement, but the fact of discovery has been notified, other Nations by courtesy pay respect to the notification, and the Usage of Nations has been to presume that Settlement will take place within a reasonable time; but unless discovery has been followed within a reasonable time by some sort of settlement, the presumption arising out of notification is rebutted by non user, and lapse of time gives rise to the opposite presumption of Abandonment."

p. 210.

"Settlement, when it has supervened on Discovery, constitutes a perfect title, but a title by settlement when not combined with a title by discovery is in itself imperfect, and its immediate validity will depende upon one or other condition, that the right of discovery has been waived de jure by non-user, or that the right of occupancy has been renounced de facto by the abandonment of the territory. Acquisition by settlement is distinguished from acquisition by discovery and acquisition by occupancy in this respect, that no second discovery, no second occupancy can take place, whereas a series of settlements may have been successively made, and each of them in its turn abandoned, and the last settlement may, under given circumstances, constitute an exclusive title. Again, the presumption of Law will always be in favour of a title by settlement. 'Commodum possidentis in eo est, quod etiamsi ejus res non sit, quî possidet, si modo actor non potuerit suam esse probare, remanet quo loco possessio; propter quam causam, cum obscura sint utriusque jura, contra petitorem judicari solet.'

"Where title by settlement is superadded to title by discovery, the Law of Nations will acknowledge the settlers to have a perfect title; but where title by settlement is opposed to title by discovery, although no Convention can be appealed to in proof of the discovery having been waived, still, a tacit acquiescence on the part of the Nation, that asserts the discovery,

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during a reasonable lapse of time since the settlement has taken place, will bar its claim to disturb the settlement. Thus Mr. Wheaton writes:--'The constant and approved practice of Nations shows, that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other, in the same manner as by the Law of Nations, and by the Municipal Code of every civilised Nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and upon the inference, fairly to be drawn from his silence and neglect, of the original defect of his title, or of his intention to relinquish it.

"Title by settlement, though originally imperfect, may be thus perfected by enjoyment during a reasonable lapse of time, the presumption of Law from undisturbed possession being, that there is no prior owner, because there is no claimant, and no better proprietary right, because there is no asserted right. The silence of other parties raises a presumption of their acquiescence, and their acquiescence raises a presumption of a defect of title on their part, or of an abandonment of their title. A title once abandoned, whether tacitly or expressly, cannot be resumed."

WESTLAKE - INTERNATIONAL LAW (1904) p. 103.

"It will be noticed that in stating the doctrine of effective occupation we have described it as being the only means of gaining a conclusive title. It was intended by this toleave open the question whether any steps taken short of effective occupation confer only an inchoate title, to be completed by effective occupation within a reasonable time, or may confer a full title, to be lost by presumptive abandonment if effective occupation does not follow within a reasonable time. The latter mode of statement has been the most usual on the continent, and falls in both with the old notion that title could be acquired by an intention

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directed to an area, and with the habit of assuming abandonment, real or presumptive, as the ground for any admission of prescription in international law. Hence writers who seem to admit the title by discovery in the ancient Spanish sense must not be reckoned as practically hostile to the doctrine of effective occupation, until it is seen whether they do not reach its goal through the theory of abandonment. The other mode of statement, with the term 'inchoate title' which is necessarily connected with it, has been much used by English writers, and agrees best both with Roman law as now understood, and with the discouragement of stale claims in the interest of peace which is the substantial reason for the admission in international law of some equivalent to the prescription of national law."

Austin 1995